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## Disparity in Judicial Misconduct Cases: Color-Blind Diversity?

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## DISPARITY IN JUDICIAL MISCONDUCT CASES: COLOR-BLIND DIVERSITY?

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## INTRODUCTION

Missouri Judge Barbara T. Peebles had served as an assistant city counselor, a prosecutor, and the First Commissioner of the St. Louis Drug Court when, in September 2000, Governor Mel Carnahan appointed her to the bench as an Associate Judge to the Twenty-Second Judicial Circuit Court, a district that includes St. Louis city.<sup>1</sup> Supporters and later detractors alike agree that Judge Peebles is a thoughtful and fair judge;<sup>2</sup> and

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1. The circuit court is Missouri's general jurisdiction court. The Court of Appeals is the intermediate appellate court that handles all appeals from the circuits except for those appeals that are exclusive to the Supreme Court. The Missouri Supreme Court is the highest court and court of last result. See 2 THE AMERICAN BENCH: JUDGES OF THE NATION 1604 (Jason Davila et al. ed. 2013) [hereinafter 2 THE AMERICAN BENCH]; YOUR MISSOURI COURTS, <http://www.courts.mo.gov> (last visited May 16, 2014) [hereinafter YOUR MISSOURI COURTS].

2. See Athena Mutua, *Seeking Justice in Missouri: The Case of the Honorable*

for most of her career, she seems to have enjoyed a fine reputation. For instance, no one in the Judge's entire legal career had ever filed a complaint against her, ethical or otherwise.<sup>3</sup> In fact, colleagues had suggested that she consider applying for elevation to the position of circuit judge or to other federal judicial positions; endeavors the Judge had begun to pursue.<sup>4</sup> Overall, she appeared to have a promising future.

However, Judge Peebles' life changed on Good Friday 2013,<sup>5</sup> when the Supreme Court of Missouri found that she had engaged in misconduct and suspended her from the circuit court bench for six months<sup>6</sup>—one of the longest suspensions meted out to a Missouri judge in recent history.<sup>7</sup> Some suggested that the timing of the decision, Good Friday, was political and meant to stifle any legislative action that might use the outcome of the case as an opportunity to challenge the vaunted Missouri Nonpartisan Court Plan.<sup>8</sup> The Plan was the first merit-based judicial selection plan passed in the United States,<sup>9</sup> and it has been under attack for several years.<sup>10</sup> The

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*Barbara T. Peebles*, in BUFFALO LEGAL STUDIES RESEARCH PAPER SERIES 1, 5-6 (2012) [hereinafter *Seeking Justice*]. See also Transcript from Mo. Comm'n on Discipline Hearing at 86, *In re Peebles*, No. SC92811 (Mo. March 29, 2013) (on file with author) (presenting the testimony of Judge Ohmer, a witness for the prosecution, who noted that lawyers were complimentary of Judge Peebles' knowledge of the law and her rulings in court and explaining that Judges have some latitude as to when they schedule their dockets and how they run their courts).

3. See Robert Patrick, *St. Louis Judge Suspended After She Turns Cases Over to Her Clerk*, ST. LOUIS POST DISPATCH (Sept. 1, 2012, 10:00 AM), [http://www.stltoday.com/news/local/crime-and-courts/st-louis-judge-suspended-after-she-turns-cases-over-to/article\\_eb963044-f382-11e1-afec-001a4bcf6878.html](http://www.stltoday.com/news/local/crime-and-courts/st-louis-judge-suspended-after-she-turns-cases-over-to/article_eb963044-f382-11e1-afec-001a4bcf6878.html). See also *Seeking Justice*, *supra* note 2, at 1.

4. As an associate judge, Judge Peebles had applied for elevation to a circuit court judge on her own bench and for a federal magistrate judge position.

5. Order, *In re Peebles*, No. SC92811 (Mo. March 29, 2013), available at <http://jurispage.com/2013/law-practice-management/the-best-law-firm-case-management-software-an-in-depth-comparison/>.

6. *Id.*

7. See Heather Cole, *Special Report: Missouri System for Judges Emphasizes Privacy Over Accountability*, MO. LAWS. MEDIA (Dec. 11, 2011).

8. See Valerie Schremp Hahn, *Missouri Supreme Court Suspends St. Louis Judge for 6 Months Without Pay*, ST. LOUIS POST-DISPATCH (Mar. 30, 2012, 12:00 AM), [http://www.stltoday.com/news/local/crime-and-courts/mo-supreme-court-suspends-st-louis-judge-for-months-without/article\\_bfe30828-d654-59bd-8c85-b6cd2edc4fb9.html](http://www.stltoday.com/news/local/crime-and-courts/mo-supreme-court-suspends-st-louis-judge-for-months-without/article_bfe30828-d654-59bd-8c85-b6cd2edc4fb9.html) (noting that Courthouse rumors in St. Louis had long speculated that the court would decline to follow the commission's recommendation to remove Peebles and that the high court would time its announcement for a day when the legislature was out of session to minimize any repercussions).

9. *Judicial Selection in the States: Missouri*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.com/judicial\\_selection/index.cfm?state=MO](http://www.judicialselection.com/judicial_selection/index.cfm?state=MO) (last visited

Missouri Supreme Court based its decision on oral arguments,<sup>11</sup> parties' briefs,<sup>12</sup> and the hearing transcript and report by the Missouri Commission on Retirement, Removal and Discipline ("the Commission"),<sup>13</sup> which argued the case. In their report, the Commission had recommended that the judge be removed because it found that she had abdicated her duties to her clerk while on vacation in China, destroyed a court document, was late to work, lacked credibility during the investigation, and admittedly had made comments to a newspaper about a pending case.<sup>14</sup>

However, upon further scrutiny, the litany of charges and findings seemed to grow, in large part, out of a conflict with another judge.<sup>15</sup> The conflict involved a male judge who insisted that Judge Peebles decide court cases, particularly bond cases,<sup>16</sup> in the way that he thought fit. She refused to follow his instructions.<sup>17</sup> This judge and his supporters responded to her refusal with harassment, interference with her court, and an ethics case for misconduct lodged before the Commission.<sup>18</sup> The ethics case took

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May 16, 2014).

10. See Hahn, *supra* note 8.

11. *In re The Matter of the Honorable Barbara T. Peebles*, DOCKET SUMMARIES SUPREME CT. MO. (Jan. 3, 2013), <http://www.courts.mo.gov/sup/index.nsf/9f4cd5a463e4c22386256ac4004a490f/52022b5791be426e86257ab7006434ea?OpenDocument> [hereinafter DOCKET SUMMARIES].

12. *Id.*

13. See generally *Commission Report on Barbara T. Peebles*, ST. LOUIS POST DISPATCH (Aug. 31, 2012, 5:05 PM), [http://www.stltoday.com/commission-report-on-barbara-t-peebles/pdf\\_fe28ac3e-f3b7-11e1-baca-001a4bcf6878.htm](http://www.stltoday.com/commission-report-on-barbara-t-peebles/pdf_fe28ac3e-f3b7-11e1-baca-001a4bcf6878.htm) [hereinafter *Comm'n Report*].

14. See *id.* at 17, 19, 21-25.

15. See *Seeking Justice*, *supra* note 2, at 3-4, 13-14.

16. *Id.* at 11-12. See also Valerie Schremp Hahn, *St. Louis Judges Say Higher Bonds May Help Curb Gun Violence*, ST. LOUIS POST-DISPATCH (June 4, 2011, 12:05 AM), [http://www.stltoday.com/news/local/crime-and-courts/st-louis-judges-say-higher-bonds-may-help-curb-gun/article\\_31e4ec8a-64bb-5e15-bd62-825a87ea84d9.html](http://www.stltoday.com/news/local/crime-and-courts/st-louis-judges-say-higher-bonds-may-help-curb-gun/article_31e4ec8a-64bb-5e15-bd62-825a87ea84d9.html) [hereinafter *Curb Gun Violence*] (describing the justification for higher bail); Jennifer Mann, *Debate Over St. Louis Gun Crime Bail Flares Anew*, ST. LOUIS POST-DISPATCH (Sept. 27, 2012, 4:00 PM), [http://www.stltoday.com/news/local/crime-and-courts/debate-over-st-louis-gun-crime-bail-flares-anew/article\\_2c064561-1d04-5518-9cad-322ce973ad95.html](http://www.stltoday.com/news/local/crime-and-courts/debate-over-st-louis-gun-crime-bail-flares-anew/article_2c064561-1d04-5518-9cad-322ce973ad95.html) (describing the origin of the program and public review of it); Gary J. Lauber, *St. Louis City Judges Raise Bail in Gun Cases and St. Louis City Homicides Drop*, MO. CRIM. LAWS. BLOG (Feb. 15, 2012), <http://web.archive.org/web/20120707090400/http://www.missouricriminallawyersblog.com/> (describing the policy and criminal lawyers dissatisfaction with it).

17. See *Seeking Justice*, *supra* note 2, at 11-12 (discussing the bail bond issue).

18. See *id.* at 11-14, 15-16 (discussing the bail bond issue, and a pattern of harassment, concluding that the White judges took offense in part because they

advantage of a miscalculation on the judge's part and centered around the fact that the judge allowed her clerks to make the first call on court announcements.<sup>19</sup> From a public perspective, her vacation tour to China served as the catalyst for the case, during which time her clerks, allegedly inappropriately, continued to manage her court.<sup>20</sup>

At roughly the same time, hundreds of miles away in Seattle, presiding municipal court judge Edsonya Charles, appointed by former Mayor Greg Nickels in 2004, fought for and eventually lost her bid to retain her judicial commission.<sup>21</sup> According to news accounts, "City Council members, the city attorney and a group of DUI lawyers"<sup>22</sup> – the latter of whom comprised

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believed she, as a Black woman, was supposed to follow their instructions).

19. See *id.* at 6-7; *Comm'n Report*, supra note 13, at 5-6, 9-15, 21-22 (discussing this practice and charging and finding it a violation of various court rules, canons, and the Missouri Constitution).

20. See *Comm'n Report*, supra note 13, at 13-14. See also, e.g., Robert Patrick, *Clerks Ran Court While a St. Louis Judge Was on Vacation Overseas*, ST. LOUIS POST-DISPATCH (Dec. 18, 2011, 2:30 PM), [http://www.stltoday.com/news/local/crime-and-courts/clerks-ran-court-while-a-st-louis-judge-was-on/article\\_c628a6c5-46d9-5c5e-9b2d-af1e45dc2a28.html](http://www.stltoday.com/news/local/crime-and-courts/clerks-ran-court-while-a-st-louis-judge-was-on/article_c628a6c5-46d9-5c5e-9b2d-af1e45dc2a28.html) [hereinafter *Clerks Ran Court*]; Robert Patrick, *St. Louis Judge's China Trip Has Her in Hot Water*, ST. LOUIS POST-DISPATCH (June 8, 2012, 12:30 AM), [http://www.stltoday.com/news/local/metro/st-louis-judge-s-china-trip-has-her-in-hot/article\\_8901d72c-13a7-55cc-849b-110976239e86.html](http://www.stltoday.com/news/local/metro/st-louis-judge-s-china-trip-has-her-in-hot/article_8901d72c-13a7-55cc-849b-110976239e86.html) [hereinafter *Hot Water*]; Patrick, supra note 3, at 1-2; Robert Patrick, *Group Rallies to Support Suspended St. Louis Judge*, ST. LOUIS POST-DISPATCH (Sept. 15, 2012), [http://www.stltoday.com/news/local/crime-and-courts/group-rallies-to-support-suspended-st-louis-judge/article\\_cd57f166-fe96-11e1-835f-001a4bcf6878.html](http://www.stltoday.com/news/local/crime-and-courts/group-rallies-to-support-suspended-st-louis-judge/article_cd57f166-fe96-11e1-835f-001a4bcf6878.html) [hereinafter *Support Suspended St. Louis Judge*].

21. See Emily Heffter, *Presiding Judge of Seattle Municipal Court Targeted for Defeat*, SEATTLE TIMES (Oct. 5, 2010, 10:00 PM), [http://www.seattletimes.nwsource.com/html/localnews/2013082641\\_municourt06.html](http://www.seattletimes.nwsource.com/html/localnews/2013082641_municourt06.html) [hereinafter *Targeted for Defeat*] (discussing opposition to Judge Charles' reelection bid in 2010 and noting that "[m]unicipal court judges, who handle drunken-driving cases, assault charges, drug offenses and other minor crimes, don't often face challengers"); Nina Shapiro, *Edsonya Charles, Muni Court Judge in Heated Reelection Race, Gets Unconvincing Rebuke From King County Bar Association*, SEATTLE WKLY. (Oct. 28 2010, 12:00 AM), <http://www.seattleweekly.com/home/932223-129/campaign2010> (discussing Charles' opponents and noting that her claims that her opponent may be "inappropriately and even illegally involved with a political action committee (PAC) made up largely of DUI defense attorneys, called Citizens for Judicial Excellence"); Edsonya Charles, *Seattle Municipal Court: Position One*, VOTINGFORJUDGES.ORG (Nov. 2, 2010), <http://www.votingforjudges.org/10gen/div1/king/sea1ec.html>; Kathy Best, *Judge Edsonya Charles Losing Seattle Court Race*, SEATTLE TIMES (Nov. 2, 2010, 9:42 PM), [http://seattletimes.com/html/politicsnorthwest/2013329398\\_judge\\_edsonya\\_charles\\_losing\\_s.html](http://seattletimes.com/html/politicsnorthwest/2013329398_judge_edsonya_charles_losing_s.html) (discussing the election that Charles lost).

22. See Heffter, *Targeted for Defeat*, supra note 21; Shapiro, supra note 21 (discussing the charges of inappropriate affiliation with PAC).

a large segment of a political action committee (“PAC”) that put \$74,000 behind her opponent’s campaign - sought her ouster.<sup>23</sup> Charles argued the affiliation between her opponent and the PAC was problematic and threatened the justice system because her opponent was or would be beholden to the DUI lawyers.<sup>24</sup> Her supporters seemed to agree, including the mayor, who suggested that the DUI attorneys targeted Judge Charles because she did not render decisions to their liking.<sup>25</sup> Others suggested that the DUI attorneys were particularly piqued because the judge “wouldn’t let private attorneys jump ‘to the head of the line’ and have their cases heard before public defenders.”<sup>26</sup> But opponents, particularly some City Council members, argued that Judge Charles was uncooperative, confrontational, and particularly unhelpful around efforts to reduce the municipal court’s budget.<sup>27</sup> Judge Charles was resoundingly defeated.<sup>28</sup>

Both Judges Peebles and Charles are women of color. Is this a coincidence?

This article presents and analyzes preliminary empirical data indicating that there are gender and racial disparities in state judicial misconduct cases. The paper focuses on formal state judicial discipline processes, rather than elections, and specifically asks: (1) Are women and judges of color disproportionately disciplined; and (2) Do women and judges of color face harsher sanctions in judicial disciplinary actions?

The latter question is currently the focus of a case in New Jersey.<sup>29</sup> A

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23. See Shapiro, *supra* note 21; Heffter, *Targeted for Defeat*, *supra* note 21; Emily Heffter, *DUI Lawyers Spend \$74,000 to Back Ed McKenna in Court Race*, SEATTLE TIMES (Oct. 26, 2010, 10:12 PM), [http://seattletimes.com/html/politicsnorthwest/2013265809\\_dui\\_attorneys\\_spend\\_74000\\_to\\_b.html](http://seattletimes.com/html/politicsnorthwest/2013265809_dui_attorneys_spend_74000_to_b.html) [hereinafter *DUI Lawyers*].

24. See Heffter, *Targeted for Defeat*, *supra* note 21; Shapiro, *supra* note 21.

25. See Emily Heffter, *Former Mayor Nickels Offers Support to Charles in Judicial Race*, SEATTLE TIMES (Oct. 27, 2010, 2:42 PM), [http://seattletimes.com/html/politicsnorthwest/2013275543\\_former\\_mayor\\_greg\\_nickels\\_weig.html](http://seattletimes.com/html/politicsnorthwest/2013275543_former_mayor_greg_nickels_weig.html) [hereinafter *Nickels Offers Support*]; Charles, *supra* note 21 (recalling the mayor noting in his email flyer: “Edsonya is facing an orchestrated and well-funded attack led by a small but well-funded special interest group of lawyers who practice in Muni Court.”).

26. See *McKenna Elected*, SQ ATTORNEYS BLOG (Nov. 6, 2010), <http://sqattorneys.com/blog/?tag=seattle-dui-attorneys>; Chris Grygiel, *Candidate Backed by DUI Lawyers Ousts Seattle Judge*, SEATTLEPI (Nov. 2, 2010), <http://blog.seattlepi.com/seattlepolitics/2010/11/02/candidate-backed-by-dui-lawyers-ousts-seattle-judge/>.

27. See Heffter, *Targeted for Defeat*, *supra* note 21.

28. See generally Best, *supra* note 21.

29. See generally Def. Summation at 2-3, *In re Campbell*, No. ACJC 2008-317 (N.J. Sup. Ct. Dec. 30, 2009).

Black male judge was publicly reprimanded for having a romantic relationship with another court employee.<sup>30</sup> Though New Jersey judiciary policy states that consensual dating relationships between court employees are not the judiciary's business, the policy nevertheless requires that the Court be informed about such relationships,<sup>31</sup> especially where the employee has been a subordinate of the judge, as was determined in this case.<sup>32</sup> Judge Wilson Campbell claims that he was more harshly disciplined than a White judge found guilty of the same misconduct.<sup>33</sup> He alleged that he was treated differently not only because he is Black, but also because he is a single Black man.<sup>34</sup> Regarding the latter claim, Judge Campbell suggests that he was treated more harshly than judges who dated and then married subordinate court staff, as well as married judges who engaged in extra marital romantic relations with court staff.<sup>35</sup>

This paper is part of a larger project and companion paper prepared for the conference on the book entitled, *Presumed Incompetent: The Intersections of Race and Class for Women in Academia*, but with a focus on judges.<sup>36</sup> The companion paper explores the Missouri disciplinary action discussed above as an example of the ways in which bias, stereotypes, and White privilege, as well as institutionalized gender and racial oppression affect the professional lives of women of color.<sup>37</sup> Studies

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30. *Id.* at 2.

31. *Id.* at 3-5.

32. *In re Campbell*, 205 N.J. 2 (2011) (ordering that Campbell, a former municipal judge be publically reprimanded for failure to report a consensual relationship with a subordinate court employee based on a complaint brought by the Advisory Committee on Judicial Conduct).

33. See Martin Bricketto, *Ex-Sedgwick Attorney Ends Suit Over Firing for Bailiff Romance*, LAW360.COM (July 9, 2013, 5:16 PM), <http://www.law360.com/articles/455835/ex-sedgwick-atty-ends-suit-over-firing-for-bailiff-romance>. See also Def. Summation, *supra* note 29, at 8 (noting that "Judge Campbell is not the first member of the judiciary to have become involved in a relationship with another judiciary employee, but he is the first to receive an ethics complaint for such a relationship. . .").

34. Def. Summation, *supra* note 29 at 8. See also, *Campbell v. Supreme Court of N.J.*, 2012 U.S. Dist. LEXIS 41650, 2012 WL 1033308 (D.N.J. Mar. 27, 2012) (on a motion to dismiss, Campbell's claim for discrimination based on race is allowed to go forward while his claim for discrimination on the basis of gender and marital status is dismissed, among other claims).

35. Complaint at 20, *Campbell v. Supreme Court of N.J.*, 2012 U.S. Dist. LEXIS 41650 (D.N.J. Mar. 27, 2012) (asserting that the opposing party was aware of a number of intimate relations between court employees in which one person held supervisory power and yet these were not charged with ethical violations).

36. PRESUMED INCOMPETENT (Gabiella Gutierrez y Muhs, et al. ed. 2012).

37. See Zeus Leonardo, *The Color of Supremacy: Beyond the Discourse of White*



of demographic disparities in the context of judicial discipline do not exist. This paper presents a first look at the raw data associated with this issue, which was assembled into a database.<sup>38</sup>

Part I of this paper briefly chronicles the difficulty encountered in trying to access the pertinent data. Part II provides a brief overview of state judicial selection and disciplinary systems, which in varying measures are meant to promote judicial independence, accountability, quality and diversity. Part III of the paper provides the findings on the demographic composition of the state bench and describes the method my researchers and I used in assembling the data. Part IV turns to the data on disciplinary cases broken down by gender and race (judges of color as compared to White judges) as they relate to the overall composition of the bench. Here particular attention is paid to the incidence of judicial removals - the harshest sanction a judge may face for misconduct. Part V delves deeper into the distribution of sanctions parsed out by groups and makes some observations about the number of charges and types of conduct that impact the determination of sanctions. These might aid in explaining the disparities. Part VI summarizes the study's findings and observations. Finally, Part VII concludes the paper with some personal thoughts on the project.

#### I. COLORBLIND DIVERSITY

Colorblind diversity may simply be an oxymoron. How can one be committed to diversity, particularly racial and gender diversity, but be blind to race and gender? The concept of diversity, itself, as many critics have noted, is deeply problematic as currently conceptualized because it disconnects diversity from historical racial and gender injustice, among other things.<sup>39</sup> In addition, in practice, few of the many who pledge loyalty

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*Privilege*, 36 EDUC. PHIL. & THEORY 137, 143 (2004) (arguing that if white supremacy and racism were simply an artifact of the past, then it would not be as formidable today).

38. The study provides a statistical analysis by race and gender of cases relating to disciplined judges. As in the California study, "the data do not permit conclusions to be drawn regarding causation . . . but reveal the trends and relationships." *California Summary of Discipline Statistics 1990-2009*, *infra* note 195. Consequently, I leave it to others to perform other analyses and evaluations. In this vein, I hope to share the database with interested others.

39. See e.g., Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003); Athena D. Mutua, et al., *Symposium: Who Gets In? The Quest for Diversity after Grutter*, 52 BUFF. L. REV. 531 (2004); Charlotte Garden & Nancy Leong, "So Closely Intertwined": *Labor and Racial Solidarity*, 81 GEO. WASH. L. REV. 1135 (2013); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale On White Identity Formation*, 89 MIAMI LAW RESEARCH PAPER SERIES 101

to the idea, seem committed to doing the hard work of reorganizing social and institutional priorities to ensure diversity or even to tracking any potential progress where changes have been made. This is certainly the case in the context of “diversifying the judiciary,” particularly among the state judicial benches. There is some work geared toward increasing the number of women and people of color on the bench by, for instance, promoting judicial selection methods that yield higher numbers of individuals from these groups.<sup>40</sup> There is also some work tracking these methods in this regard.<sup>41</sup> However, there is no work, of which I am aware, tracking the ways by which judges of color may be disproportionately leaving the bench. The lack of data collection and analysis in this area may be compounded by the strongly emerging and problematic norm of colorblindness, as it counsels that seeing “race,” in particular, is inappropriate.<sup>42</sup>

Studies of gender and racial disparities in the context of state judicial discipline do not exist. Information about judicial disciplinary actions across all fifty states, however, is available and maintained by the American Judicature Society (“AJS”) in the form of case summaries.<sup>43</sup> These summaries can be accessed in full for the price of membership in its Judicial Ethics Center and are organized by type of misconduct.<sup>44</sup> While the summaries do not provide the racial, ethnic or gender status of the judges disciplined, they do provide the state where a reported judge presides, and often an official case cite, if one exists. The database that this paper relies upon draws on state judges disciplined from 2002 to 2012, a total of 1,263 cases, as reported by AJS.

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(2014) (discussing the way in which the diversity rationale reinforces a sense of superiority in Whites and, fosters a belief in individuality, thereby promoting ignorance of the context of racial and gender systems and structures of privilege and disadvantage that shape peoples’ lives).

40. See *infra* note 128-138 and accompanying text (discussing the merit system for selecting judges as possibly improving both the quality and diversity of judges).

41. *Id.* See also *infra* notes 109-115 and accompanying text (discussing the value of judicial diversity).

42. See *infra* notes 79-94 and accompanying text (discussing the problems with the concept and strategic use of colorblindness).

43. *Center for Judicial Ethics*, AM. JUDICATURE SOC’Y, <https://www.ajs.org/index.php/judicial-ethics/information-service> (last visited May 16, 2014). Access to the full Judicial Discipline Decision Summaries database is by membership only. A copy of the database from 2001 to March 2014 is on file with author. [Hereafter referred to as *AJS Case Summaries Database*]. *But see*, *Judicial Conduct Reporter*, AM. JUDICATURE SOC’Y, <https://www.ajs.org/index.php/judicial-ethics/judicial-conduct-reporter> (last visited May 16, 2014)

44. *AJS Case Summaries Database*, *supra* note 43.

There is also reasonably accessible information, much of it proprietary, which provides the names and credentials of state judges across the nation.<sup>45</sup> However, little of this information provides the gender and racial status of these individuals. Information on the federal bench is the glaring exception. The names of those judges who sit on the federal bench can be easily accessed online.<sup>46</sup> The online database not only provides whole numbers of those on the bench, but provides and is searchable by the gender and racial status of the judges.<sup>47</sup> When I attempted to compile the information for a database on the state bench, including the names, racial and gender status of judges, for the purpose of identifying any disparities, I encountered two crucial problems. First, as previously suggested, the information on state judges' racial and gender status was not readily available.<sup>48</sup> This was particularly problematic as most judicial disciplinary proceedings occur at the state level.<sup>49</sup> Second, there appeared to be some resistance to the very questions being posed. These included questions about the demographic composition of the state bench; questions about the racial, ethnic, and gender status of judges; and, questions about whether racial and gender disparities exist among those subject to misconduct proceedings and in the sanctions imposed.<sup>50</sup>

Both problems are curious.

#### *A. Farce: Data and Diversity*

One would think that finding the demographic data to answer the questions posed in this paper would be relatively easy to find and readily available. After all, beginning in the late 1980s, many states commissioned

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45. See e.g., *Judicial Conduct Reporter*, *supra* note 43; *The American Bench 2014 Edition Now Available*, FORSTER-LONG.COM, <http://www.forster-long.com/americanbench.asp> (last visited May 16, 2014) [hereinafter *American Bench Available*].

46. *History of the Federal Judiciary*, FED. JUD. CTR., <http://www.fjc.gov/history/home.nsf/page/researchcategories.html> (last visited May 16, 2014).

47. *Id.*

48. See *infra* note 50 (discussing the organizations we contacted in trying to ascertain this information).

49. This would make sense as the state bench is comprised of over 17,000 lawyers while the federal bench is comprised of 3,000 to 4,000 lawyers.

50. My research assistants and I contacted multiple agencies, including: The Am. Bar Ass'n, The American Judicature Soc'y, The Nat'l Ass'n for Law Placement, The Nat'l Ctr. for State Courts, The Nat'l Judicial Coll., and The Brennan Ctr. for Justice. We also contacted a number of judicial administration offices in a number of states, such as Arizona, New Jersey, New Mexico, New York, and Texas.

taskforces to examine gender and/or racial bias in the justice system.<sup>51</sup> One of the many findings of these taskforces was that the judiciary lacked diversity, and as a consequence, public confidence in these systems, the overall legitimacy of the judiciary and perhaps justice itself appeared to suffer.<sup>52</sup> Presumably, these studies relied on demographic data on the judiciary, information crucial to these types of studies. State information might well have been readily available for state taskforces, but associations also reported nationally on the state of diversity in state courts.<sup>53</sup>

Further, most nationally legal-focused associations have a section or committee charged with studying, and presumably promoting, issues of diversity.<sup>54</sup> Therefore, one would expect these organizations to have information that tracked the ways in which the profession was becoming more or less diverse.<sup>55</sup> Moreover, much has been written about the impact of the different judicial selection methods—election, governor appointed, commission appointed judges—on diversity.<sup>56</sup> Thus, even if no one had

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51. See *Gender and Racial Fairness State Links*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/State-Links.aspx> (last visited May 16, 2014) (including the following states: Alaska, Arizona, California, Colorado, District of Columbia, Florida, Georgia, Indiana, Maryland, Massachusetts, Minnesota, Nebraska, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Washington, and West Virginia). See generally Lynn Hecht Schafran & Norma Juliet Wikler, *Gender Fairness in the Courts: Action in the New Millennium*, THE GENDER FAIRNESS STRATEGY PROJECT, available at <http://womenlaw.stanford.edu/pdf/genderfairness-strategiesproject.pdf>.

52. See LAWYERS COMM. FOR CIVIL RIGHTS UNDER LAW, ANSWERING THE CALL FOR A MORE DIVERSE JUDICIARY: A REVIEW OF STATE JUDICIAL SELECTION METHODS AND THEIR IMPACT ON CREATING A MORE DIVERSE JUDICIARY 5 (2005), available at [http://www.lawyerscommittee.org/admin/public\\_policy/documents/files/more\\_diverse\\_judiciary.pdf](http://www.lawyerscommittee.org/admin/public_policy/documents/files/more_diverse_judiciary.pdf) [hereinafter LAWYERS COMM.].

53. *Gender and Racial Fairness: State Links*, *supra* note 51.

54. AM. BAR ASS'N, [http://www.americanbar.org/groups/centers\\_commissions.html](http://www.americanbar.org/groups/centers_commissions.html) (last visited May 16, 2014); AM. JUDICATURE SOC'Y, <https://www.ajs.org/> (last visited May 19, 2014); NAT'L CTR. ST. CTS., <http://www.ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/Resource-Guide.aspx> (last visited June 1, 2014); *Legal Momentum*, THE WOMEN'S LEGAL DEFENSE AND EDUCATION FUND, <https://www.legalmomentum.org> (last visited June 10, 2014).

55. NAT'L CTR. ST. CTS., <http://www.ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/Resource-Guide.aspx> (last visited June 1, 2014).

56. See, e.g., MALIA REDDICK, MICHAEL J. NELSON, & RACHAEL PAINE CAULFIELD, EXAMINING DIVERSITY ON STATE COURTS: HOW DOES THE JUDICIAL SELECTION ENVIRONMENT ADVANCE—AND INHIBIT—JUDICIAL DIVERSITY? 1 (Am. Judicature Soc'y, 2010); Linda M. Merola & Jon B. Gould, *Navigating Judicial Selection: New Judges Speak About the Process and its Impact on Judicial Diversity*, 93 JUDICATURE 184, 184 (2010).

focused directly on diversity and judicial misconduct, one would expect the data on women and people of color in the judiciary to be available.

This, however, is not the case, at least not for state judges. Forster Inc., the publisher of the American Bench directory, provides biographical information on both federal and state judges. Since 2006, this directory has included a gender report, but the directory does not include a separate list of women judges.<sup>57</sup> The directory also does not provide a report on racial or ethnic progress in the judiciary or provide racial status information on judges. National racial data, at the level of the state benches is only episodically available and then is incomplete.<sup>58</sup> Recently, however, the ABA has undertaken an endeavor to provide the racial and gender status on all state judges. It expects to go online with such data within a year.<sup>59</sup> But at this juncture, diversity and data on diversity on the state bench is by half measure a farce.<sup>60</sup>

### *B. Charade: Colorblind Resistance*

While data issues complicated the construction of the database used in this study and shaped some of its limitations, one other factor frustrated the completion of the database upon which this paper relies: Resistance by

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57. See 1 THE AMERICAN BENCH: JUDGES OF THE NATION (Jason Davila et al. ed. 2013) [hereinafter 1 THE AMERICAN BENCH].

58. See generally AM. BAR ASS'N 2001 JD STANDING COMM. ON MINORITIES IN THE JUDICIARY, THE DIRECTORY OF MINORITY JUDGES OF THE UNITED STATES (3d ed. 2001) [hereinafter MINORITIES IN THE JUDICIARY (3d ed.)]; AM. BAR ASS'N JUDICIAL DIV. STANDING COMM. ON MINORITIES IN THE JUDICIARY, THE DIRECTORY OF MINORITY JUDGES OF THE UNITED STATES (4th ed. 2008) [hereinafter MINORITIES IN THE JUDICIARY (4th ed.)]; *National Database on Judicial Diversity in State Courts*, AM. BAR ASSOC. STANDING COMM. ON MINORITIES IN THE JUDICIARY, <http://apps.americanbar.org/abanet/jd/display/national.cfm> (last visited May 19, 2014) [hereinafter *ABA Database on Judicial Diversity*] (publishing national data on race in the judiciary irregularly, but updated as of 2010).

59. Interview with Peter Koelling, Dir. & Chief Counsel, Am. Bar Ass'n & Shawn Sanford, Am. Bar Ass'n (August 2013) [hereinafter Interview].

60. "A farce is a broad satire or comedy, though now it's used to describe something that is supposed to be serious but has turned ridiculous. If a defendant is not treated fairly, his lawyer might say that the trial is a farce. As a type of comedy, a farce uses improbable situations, physical humor and silliness to entertain . . . If a real-life event or situation is a farce, it feels ridiculous. An election is a farce, if the outcome has been determined before the voting begins. And class can feel like a farce if your substitute teacher knows less about the subject than you do." DEFINITION OF FARCE, <http://www.vocabulary.com/dictionary/farce> (last visited July 7, 2014); "A funny play or movie about ridiculous situations and events, the style of humor that occurs in a farce: something that is so bad that it is seen as ridiculous." DEFINITION OF FARCE, <http://www.merriam-webster.com/dictionary/farce> (last visited July 9, 2014) [Hereinafter FARCE, MERRIAM].

several of those who might have access to pieces of the data puzzle.<sup>61</sup> This resistance may have arisen because asking questions about the demographics of the bench made it clear that there was little information in a coherent and updated form held by some of those who presumably should have had it; especially those that produce reports on diversity.<sup>62</sup> Yet, it can be conceded that this information is difficult to find.<sup>63</sup> First, lawyers are becoming judges all the time and any number of judges leave the bench each year. Further, the judges themselves may or may not provide their racial or gender status.<sup>64</sup> Gender status may be readily inferable by name, but there is no guarantee of the accuracy of the inference because some names are more gender ambiguous.<sup>65</sup> Race, what it means and how people identify themselves may not be so obvious. Thus, where judges themselves do not provide this information, the difficulty of assessing racial status is greatly increased.

The resistance to the questions presented in this paper, however, appeared to be about more than the difficulty arising from compiling this information. The very nature of the questions seemed to rattle some respondents. Some of those responding to requests for the gender, racial or ethnic status of judges for the purpose of establishing the demographic composition of the state bench seemed to imply that the inquiry itself was illegitimate. This was true of many state judicial staff members, but included others as well. For instance, a senior official of a state minority bar association responded to such an inquiry with indignation, asking why anyone would think that they had this kind of information.<sup>66</sup> The reply was simple, the team had assumed (mistakenly, obviously) that such an organization was likely to promote judicial diversity, among other things, and in doing so might keep lists of women judges and judges of color in order to track progress.<sup>67</sup>

In the context of judicial disciplinary proceedings, the reaction to these

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61. See e.g., *supra* note 54 (discussing the American Bar Association and the National Center for State Courts as examples of organizations that possess information on state judges and also have organizational sections on diversity).

62. *Id.*

63. This was the reason given by an official at the National Council of State Courts.

64. See Interview *supra* note 59 (speaking with Shawn Sanford of the Am. Bar Ass'n).

65. See, e.g., Interview *supra* note 59.

66. Incident involving a letter requesting the ethnicity of a short list of judges from the state of Arizona.

67. E-mail from executives of Arizona Minority Bar Ass'n to Athena D. Mutua, Professor of Law, SUNY Buffalo Law School (on file with author).

inquiries elicited a more heightened sense of indignation and illegitimacy. As more than one person exclaimed: “The real question in the judicial misconduct context is whether they “did it or not” – whether the judge in question engaged in misconduct or not.” That is, the questions of gender and particularly racial disparities, with regard to misconduct seemed to distress all sorts of respondents, who implied that these questions were inappropriate in a myriad of ways.

All things being equal, these rattled souls might be correct. That is, in a perfect world, questions of racial, gender, and class discrimination, bias, disadvantage, disproportionality and disparity might be the wrong questions to ask in general, and wrong in regard to judicial misconduct, in particular. However, we do not live in such a country or world.

Gender and racial disparities are ubiquitous in the United States. These disparities appear in every social indicia of well-being, from health and mortality status<sup>68</sup> to incarceration levels<sup>69</sup> to employment, income and wealth status.<sup>70</sup> They also are endemic with regard to access to just about everything that is socially necessary, from clean water and environmentally safe neighborhoods<sup>71</sup> to legal representation.<sup>72</sup> Though there is debate about whether disparities are due to discrimination and bias or something else, they exist nonetheless. Further, some might argue that these disparities—for those who lose out—reflect issues that lie within particular

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68. See generally ALBELDA & DRAGO, *infra* note 74. See also *CDC Health Disparities and Inequalities Report 2013*, CENTER FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/mmwr/pdf/other/su6203.pdf> (Last visited June 10, 2014).

69. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (New Press 2012); Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System*, NATIONAL COUNCIL ON CRIME AND DELINQUENCY (March 2009), [http://www.nccdglobal.org/sites/default/files/publication\\_pdf/created-equal.pdf](http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf).

70. See generally ALBELDA & DRAGO *infra* note 74; THOMAS M. SHAPIRO & MELVIN L. OLIVER, *BLACK WEALTH/ WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1997); MARIKO LIN CHANG, *SHORTCHANGED: WHY WOMEN HAVE LESS WEALTH AND WHAT CAN BE DONE ABOUT IT* (2012).

71. See e.g., Tom Romero, *The Color of Water: Observations of a Brown Buffalo in Ten Stanzas*, 15 U. DENV. WATER L. REV. 329 (2012) (discussing the racialization and differential access to water); Robert J. Brulle & David N. Pellow, *Environmental Justice: Human Health and Environmental Inequalities*, 27 ANNUAL REV. OF PUB. HEALTH 103 (2006)(providing an overview on the studies of disparities and inequalities from an environmental and structural perspective).

72. See e.g., Gerald Ellis, *Income Inequality and Unequal Access to Justice*, THE LEGAL FINANCE JOURNAL (2011), <http://legalfinancejournal.com/income-inequality-and-unequal-access-to-justice/>.

individuals or their culture.<sup>73</sup> However, these left out individuals often belong to groups, women and people of color, who, as Albeda and Drago note, “are the same groups that lost [out] yesterday, yesteryear, well into the last century, and often beyond.”<sup>74</sup>

At the same time, institutional proclamations of support for diversity are as ubiquitous as gender and racial disparities are throughout American society.<sup>75</sup> As such, it is curious that research inquiries into disparities in

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73. See, e.g., HERITAGE FOUND., <http://www.heritage.org> (last visited May 19, 2014); W. Grant Ellis, *Freedom is Hard Work (Obamacare Makes it Harder)*, AM. THINKER (Oct. 15, 2009), [http://www.americanthinker.com/2009/10/freedom\\_is\\_hard\\_work\\_obamacare.html](http://www.americanthinker.com/2009/10/freedom_is_hard_work_obamacare.html); *Defending the Dream: Why Income Inequality Doesn't Threaten Opportunity*, HERITAGE FOUND., (Sept. 14, 2012), <http://www.heritage.org/research/factsheets/2012/09/defending-the-dream-why-income-inequality-does-not-threaten-opportunity> [hereinafter *Defending the Dream*] (arguing that social disparities are caused by particular individuals or their culture).

74. RANDY ALBELDA & ROBERT DRAGO, UNLEVEL PLAYING FIELD: UNDERSTANDING WAGE INEQUALITY AND DISCRIMINATION 35 (4th ed. 2013) (noting the following disparities in wages: “(1) Real wages rose steadily from World War II until the early 1970s. After that, wages fell through the early 1980s, stagnated through the mid-1990s and have risen only slightly since then; (2) Black men still earn only about eighty percent of the wages of White men; (3) The wage gap between Black and White women fell over the 1960s and 1970s to less than ten percent.; (4) The male female wage gap has fallen steadily since the early 1970s; however females earn only a little more than three quarters what their male counterparts earn; (5) There has been a slight upward trend in overall unemployment rates in the post-World War II; (6) Black unemployment rates have consistently been over twice as high as White unemployment rate, and in contrast, female unemployment rates have usually been lower than male rates since the early 1980s; (7) Blacks, Hispanics, and women are much more likely than White men to work in low wage industries and occupations; (8) Race and gender wage gaps result from differences within as well as between occupations, and (9) Race and gender wage gaps persist even when age, education, and labor force commitment are comparable”). Albelda and Drago argue that racial and gender discrimination play a role in wage disparities between Whites and people of color and women and men. However, other factors such as education, experience, hours worked, industry and occupational differences likely play also play large role in the wage gap, even as discrimination also inheres in structural factors such as labor segmentation and occupational segregation. Thus, the causes of disparities are likely complicated and complex.

75. See Kim D. Chanbonpin, “*It’s a Kakou Thing\**: The DADT Appeal and a New Vocabulary of Anti-Subordination”, 3 U.C. IRVINE L. REV. 905, 910 (2014)(discussing diversity programs in the military); *Diversity and Inclusion*, ASS’N AM. MED. CS., <https://www.aamc.org/initiatives/diversity/> (last visited May 19, 2014) (stating “[t]he AAMC’s commitment to diversity includes embracing a broader definition of “diversity” and supporting our members’ diversity and inclusion efforts. . .”); *Diversity & Inclusion*, ASS’N LEGAL ADMIN., <http://www.alanet.org/diversity/> (last visited May 19, 2014) (stating ALA’s goal is to increase diversity and inclusion in the Association,



judicial punishment for the purpose of identifying obstacles to achieving and maintaining diversity on the state judicial bench were met with such inhospitable reactions. While there may be multiple reasons for this, four reasons stand out.

First, people may have been resistant to providing information of this nature because evidence of racial, ethnic, and gender disparities seem to fly in the face of proclamations claiming support for diversity. Second, it may be that questions of a person's racial, ethnic, or gender status offends our conceptions and sensibilities around the meaning of the human person.<sup>76</sup> That is, questions such as a judge's racial status seem to compromise human dignity by, among other things, reducing each unique, multidimensional individual—with life and professional experiences, capabilities and talents—to one aspect or dimension of their full personhood.<sup>77</sup> This seems to be an immanently fair concern, but one of dubious application in the face of processes which may well disadvantage judges on the basis of that single dimension, ignoring their life and professional experience, etc.

A third reason might be the context of judicial discipline itself. That is, questions about racial, ethnic, and/or gender disparities in the context of judicial discipline may have been seen by some, perhaps correctly, as questioning whether the proceedings were fair. In fact, a staff member of a judicial commission made a point of explaining that the commission did not keep this data because it was irrelevant to the process. She insisted that no proceeding would ever be conducted because of a person's race, ethnicity or gender.<sup>78</sup>

Finally, a fourth possibility for resistance to the questions posed may be that the questions undermined a more powerful emergent norm; the mainstream norm of colorblindness. Colorblindness, presumably, is meant to capture the notion of human dignity discussed above, counseling that

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in the legal management committee and in all legal service organizations"); *Corporate Responsibility: Diversity*, UPS, <http://www.community.ups.com/UPS+Foundation/Focus+On+Giving/Diversity> (last visited May 19, 2014) (stating "[w]ith more than 400,000 employees and operations in over 220 countries and territories, we are as diverse as the communities we serve. As a result, a commitment to diversity and inclusion is deeply entrenched in all facets of our organization"). See also *Grutter v. Bollinger*, 123 S. Ct. 235, 239 (2003).

76. Rhonda V. Magee, *The Third Reconstruction: An Alternative to Race Consciousness & Colorblindness in Post Slavery America*, 54 ALA. L. REV. 483, 485 (2003) (discussing the failures of colorblindness and race consciousness).

77. *Id.* at 520.

78. Response of a staff member of the State of Texas judicial commission to inquiries to confirm whether a set of judges were of Latina/o ethnicity.

color is only skin-deep.<sup>79</sup> However, the mainstream rhetoric of colorblindness facilitates deep reactionary racial work by first separating color from race and second by disconnecting race from racial hierarchy and injustice by gaming the society's slippery use of the word "race." The word "race" is sometimes used to refer simply to biological characteristics, like color, or to refer to groups historically and currently privileged or disadvantaged by the U.S. system of racial hierarchy, or to the system of hierarchy itself. This system is a socially constructed hierarchal structure of privilege and domination based on phenotype (color), among other traits. This hierarchy, alive and well today, socially positions Whites over people of color and structures the mal-distribution of resources and opportunities through past and current actions, arrangements, and processes of people, institutions and social systems.

Thus mainstream colorblindness works by ignoring the connections between color, groups and hierarchy and facilitates easy disjuncture. First, it separates color from race, despite the fact that the system of racial oppression by Whites over people of color is based on color. Second it facilitates the easy substitution of "race" for "color" thereby suggesting that "race" is only skin-deep,<sup>80</sup> and that people should not be reduced simply to their "race."<sup>81</sup> In doing so, this emerging norm conveniently disconnects race - as only skin-deep- from the structure of racial hierarchy based on phenotype (color).

Third, used strategically by politicians, judges, the media and others, the idea that society should be race blind counsels against racial remedies and justice (such as affirmative action programs), which when heeded, maintain in the modern moment what Justice Harlan assumed would be the case in the future – the maintenance of White dominance and privilege. A progressive notion at the time, Justice Harlan, in his famous dissent in *Plessey v. Ferguson*,<sup>82</sup> rhetorically and aspirationally proclaimed the colorblindness of the law, on the one hand, while assuming the superiority of the White race socially, on the other.<sup>83</sup> The modern Supreme Court can

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79. IAN HANEY-LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 86 (2014) (discussing the "allure of colorblindness" and discussing its development from an aspirational idea to a reactionary ideological tool that enhances and furthers the "new racism" that has enlivened prejudice and had a detrimental effect on the economy).

80. *Id.*

81. See generally *e.g.*, MICHAEL OMI et al., *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2nd ed. 1994).

82. *Plessey v. Ferguson*, 163 U.S. 537 (1896).

83. *Id.* at 559 (stating, "The White race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great

be said to have resurrected this idea; and in doing so, has chosen to ignore race as structure and its present day operation and effects.<sup>84</sup> In addition, the Court has ignored the more expansive notion wistfully imagined by Martin Luther King, Jr. However, King, in aspiring to a time when people would be judged by their character rather than the color of their skin, envisioned a colorblind idea that required both equality and justice for people historically oppressed both *by law* and socially, including the social, cultural and economic realms, all of which are shaped by law.<sup>85</sup> King's concept recognized and sought remedy for the differing social positioning of Whites and people of color. He also presumably, given the times, invoked a concept capable of embracing the acknowledgement, celebration, pride, and solidarity around difference.<sup>86</sup> That said, even the law has never been colorblind even when race, as a construct or a biological reference to peoples' skin-color, has gone unmentioned (i.e. race-neutral laws).<sup>87</sup>

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heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law"). *See also* Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 772-73 (2007) (Thomas, J., concurring) (arguing in favor of prohibiting public schools in the school district from considering race in their assignment of pupils to schools in the effort to maintain integrated schooling. Thomas noting: "I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy*: 'Our Constitution is color-blind, and neither knows nor tolerates classes among citizens'"). Though Justice Thomas goes on to claim this notion as it grew out of the civil rights era tradition, the two notions are quite different and grow out of different circumstances.

84. The Court has held that societal discrimination and oppression wrought by three hundred or so years of "racialized slavery, Jim Crow laws, gerrymandered voting districts, racially restrictive immigration laws, internment camps, stolen land grants, silenced languages and lost identity" is too amorous to remedy. *See* *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986) (quoting Justice Powell) and Stephanie Phillips, *The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History*, 53 U. MIAMI L. REV. 1247 (1999) (discussing various experiences of racism).

85. *See* Ned Resnikoff, *Four Ways Martin Luther King Jr. Wanted to Battle Inequality*, MSNBC (Jan. 19, 2014), [http://www.msnbc.com/all/mlks-fight-against-economic-inequality\\_](http://www.msnbc.com/all/mlks-fight-against-economic-inequality_)

86. This is an idea that I have discussed in other forms. *See* Athena Mutua, *The Rise, Development, & Future Directions of Critical Race Theory & Related Scholarship*, 84 DENV. U. L. REV. 329, 335-36 (2006).; *Valuing Difference, Exercising Care in Oz: The Shaggy Man's Welcome*, 20 S. Cal. INTERDISC. L. J. 215, 230-237 (2010).

87. The Supreme Court is certain that the society and the law should be colorblind. *See e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 341-42 (2003)(explaining that race-conscious admissions must have a logical end and expressing expectation that in

Mainstream colorblindness, and gender blindness by analogy, thus rhetorically translates the aspiration that the color of one's skin *should* not matter into the *ahistorical and present-day falsehood that the color of one's skin does not matter*.

In other words, many scholars have critiqued the mainstream colorblind notion, not just for masking the connection between color and race and race as a hierarchal structure but also for the way the Court applies it.<sup>88</sup> They argue that the Court assumes that a colorblind society already exists in law and elsewhere, and then renders decisions based on this fiction, this charade.<sup>89</sup> It thus further compounds the disconnect between racial

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25 years they will not be necessary). But it is not clear that the Court is correct and that there are no other worthy visions of the future, despite the Court's certainty. Seeing "color" is not the same thing as denying people opportunities because of their color or assuming characteristics about them – racism. Nevertheless, even where the law never mentions race or the ethnicity of a person or group, the law often is not colorblind in any way that matters. *See generally* e.g. Michele Alexander, *supra* note 69. Further consider the colorblind laws of the New Deal. Again, the New Deal laws did not mention race but they were intentionally racially constructed *See generally* e.g., MICHAEL K. BROWN, ET AL., *WHITEWASHING RACE: THE MYTH OF COLOR-BLIND SOCIETY* (2003). But today's jurisprudence is even more sinister as it may simply camouflage bias at the level of the Supreme Court.

88. *See e.g.*, HANEY-LOPEZ, *supra* note 79; Francisco Valdes & Sumi Cho, *Critical Race Materialism: Theorizing Justice in the Wake of Global Neoliberalism*, 43 CONN. L. REV. 1513 (2011); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009); Girardeau A. Spann, *The Conscience of a Court*, U. MIAMI L. REV. 431 (2009) (suggesting that the conservative majority on the Court is engaged in racial discrimination in *Parents v. Seattle* and that the Court "merely relies on a standard litany of assertions, derived from prior affirmative action cases, that were never themselves supported by adequate instrumental justifications"); Ian F. Haney Lopez, "*A Nation of Minorities*": *Race, Ethnicity and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007) (tracing the history of colorblindness); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOWARD L.J. 1, 63-90 (1995) (discussing the fallacy of equating benign and invidious discrimination, a function of colorblindness reasoning); Guy-Uriel E. Charles, *Affirmative Action and Colorblindness from the Original Position*, 78 TUL. L. REV. 2009 (2004) (arguing against colorblind constitutionalism in *Grutter*); Jerome Mccristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994) (arguing that colorblindness allows the legal infrastructure to maintain its bias against racial minorities); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (demonstrating how the Supreme Court through its use of colorblindness perpetuates discrimination).

89. *See e.g.*, Gotanda *supra* note 88. "Charade" is defined as "an absurd pretense intended to create a pleasant or respectable appearance . . ." DEFINITION OF CHARADE, <http://www.oxforddictionaries.com/us/definition/americanenglish/charade> (Last visited July 15, 2014) [Hereinafter CHARADE, OXFORD]; "Something that is done in order to pretend something is true when it is not really true. . . an empty or deceptive act or

hierarchy and skin color that the mainstream notion of colorblindness rhetorically accomplishes. The effect has been to freeze the status quo of skin-based privilege, domination, disadvantage and oppression in place and project it into the future.<sup>90</sup> In fact, some scholars suggest that it is the Court's *intention*, as well as, many of its adherents, to freeze in place the current material conditions of White domination from which White privilege arises, along with its attendant consequences of White access to superior resources and opportunity.<sup>91</sup> The Court, as such, it is argued, perpetuates disadvantage, while simultaneously - as others have in the past - claiming to promote equality, freedom and justice.<sup>92</sup>

Some go even further, arguing that both colorblindness in law and post-racialism in political discourse are not simply meant to mask and then conveniently ignore current discrimination, oppression and mal-distribution of resources.<sup>93</sup> Rather, they mean to accomplish these goals while also delegitimizing racial justice movements' social, legal, political and economic critiques along with their remedial demands, as well as, their self-regarding efforts and celebrations, as a means for further facilitating White privilege and White conscious solidarity in discrimination.<sup>94</sup> As

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pretense." DEFINITION OF CHARADE, <http://www.merriam-webster.com/dictionary/charade> (Last visited on June 6, 2014) [Hereinafter CHARADE, MERRIAM].

90. See e.g., Jerome McCristal Culp, Jr., *supra* note 88.

91. This suggests something more than just indifference to the plight of people of color. See Spann, *The Conscience of a Court* *supra* note 88. See also Zeus Leonardo, *supra* note 37 (explaining that human action, agency and not simply structure is responsible for the continuation of domination and oppression).

92. See e.g., Derrick Bell, *The Constitutional Contradiction*, in WE ARE NOT SAVED: THE ILLUSIVE QUEST FOR RACIAL JUSTICE (discussing the Founding Fathers claims of fighting for freedom, liberty and justice while maintaining slavery); and Valdes & Cho, *supra* note 88, at 1517 (discussing the ways in which the current Court and society seek and are maintaining material and structural oppression of people of color while asserting an ideology of equality through colorblindness which in part aids in maintaining disadvantage).

93. See generally Cho, Post-Racialism *supra* note 88.

94. *Id.* Compare Reva Siegal, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011) (suggesting that one can discern a concern about racial balkanization in the Court's jurisprudence). With regard to attempts by Whites to limit the self-regarding efforts and celebrations of people of color, consider the recent case involving Arizona's law banning the teaching of ethnic studies as inappropriately race related in public schools; particularly the teaching of Mexican-American history to Mexican -American students, whose test scores and interests in school increased substantially after taking these classes. Arizona claims that the courses are not only impermissibly race-related but stimulate racial resentment, presumably toward Whites. See Cindy Carcamo, *Judge upholds Arizona law banning ethnic studies classes*, LA TIMES (March 12, 2013),

such, to the extent people accept and internalize this emergent norm, these critics understand them as having an interest in (benefitting from) and/or uncritically accepting colorblind pretenses and post-racial nonsense.

In response to requests for information about judges' racial and ethnic status, some respondents may have been reacting out of this internalized norm; one where acknowledgment of difference seemed inappropriate, as dictated by the narrow supremacy enhancing precepts of colorblindness. However, these reactions, no matter the motivation, coupled with the actual lack of data in the context of identifying disparities and problems, nonetheless work to tell the lie of present-day equality and freedom while frustrating its future possibility.

Nevertheless, preliminary results of the study provide even these people something about which to smile. Some of the disparities appear quite small though statistically significant. In addition, the ABA is working on a project that seeks to provide the numbers of women and judges of color as part of determining the overall composition of the state judicial bench.<sup>95</sup> However, this project will represent the then-current bench; thus, longitudinal studies that draw on information that predate the new database likely will be forced to continue to employ more ad hoc methods of tracking the composition trends of the state bench.<sup>96</sup>

These reactions did flag one other concern. In the book *Presumed Incompetent*, many of the book's stories are about innocent survivors of discriminatory outrage.<sup>97</sup> But, in the misconduct context, many of the people involved are more visibly flawed; they made mistakes or potentially engaged in outright misconduct, ethically or otherwise.<sup>98</sup> That is, they appear less sympathetic. Yet, basic fairness remains the issue. As in the criminal justice system, the question is the same: Why should a disproportionate number of people of color have their lives ruined (here through discipline or removal) for engaging in conduct in which an equal number or more White individuals engage, receiving instead a mere slap on the wrist (drug use is the classic example)?<sup>99</sup>

Despite these challenges, the study managed to collect and compile the

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<http://articles.latimes.com/2013/mar/12/nation/la-na-nn-ff-ethnic-studies-arizona-20130312>.

95. Interview with Peter Koelling, *supra* note 59.

96. *Id.*

97. See generally, *Presumed Incompetent*, *supra* note 36.

98. See *Seeking Justice*, *supra* note 2, at 10-11.

99. See e.g., Michelle Alexander, *supra* note 69; Human Rights Watch, United States – *Punishment & Prejudice: Racial Disparities in the War on Drugs* (May 2000), <http://www.hrw.org/reports/2000/usa/> (Last visited March 7, 2014).

data needed.<sup>100</sup> This paper will turn to this data after first situating the judicial discipline process within the varied mechanisms employed to promote the administration of justice and then describing the construction, omissions and limitations of the database.

## II. OVERVIEW OF JUDICIARY SELECTION AND DISCIPLINE PROCEDURES: INDEPENDENCE, ACCOUNTABILITY, QUALITY AND DIVERSITY

Judicial discipline procedures are simply one set of mechanisms that states use to both organize and regulate the judiciary. Other mechanisms include rules, codes of behavior, legal standards and procedures, as well as systems and institutions for the selection, promotion, retention, and evaluation of judges and their performance.

The systems and institutions that govern selecting, promoting, retaining and disciplining judges, theoretically, serve to promote, on the one hand, the goal and value of judicial independence and on the other hand, accountability. The concept of judicial independence is one of the bedrocks of American judicial thought.<sup>101</sup> Ensuring it, in part, is meant to shield the judiciary both from the vagrancies of politics, including oversight from those outside the judicial branch (e.g. partisanship) and from corruption by private and public parties (e.g. bribery).<sup>102</sup> It is meant to secure impartiality of judges. However, independent judges or an independent judiciary means that judges potentially wield tremendous power. This power must be checked against abuse. It must also be rendered legitimate, a necessity, in a democratic order. Consequently, these systems and institutions are also meant to promote both democratic accountability and accountability against wrong-doing.<sup>103</sup> Scholars see the values of independence and accountability as opposing ideas or at least ideas in tension with one another.<sup>104</sup> Geoffrey Miller sums up the tensions commenting that the policy tradeoffs between the two are unavoidable. He notes:

Independence safeguards the public against governmental oppression or expropriation and protects against corruption of the administration of justice by private interests. At the same time, judges wield enormous authority including the power of judicial review. Accordingly, their independence cannot be unlimited. They must be accountable to the public through some type of democratic

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100. See *infra* Part III.

101. Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 456-7 (2004).

102. *Id.*

103. However, accountability to the public can stifle and skew independence. *Id.*

104. *Id.*

process. The tradeoff between independence and accountability is unavoidable. . .<sup>105</sup>

The mechanisms of selection and discipline, among others, are often meant to promote two other values important to the judiciary's administration of justice. These are the values and goals of *quality*, primarily in terms of a judge's, integrity and impartiality (again), and the value of diversity.<sup>106</sup> Independence and accountability when both working together can enhance the quality of judges. As Miller notes, "if judges are not independent, they will be subject to influences that could distort the outcomes of cases, skew the development of substantive law, and detract from public confidence in the judicial system."<sup>107</sup> Said differently, the quality of the decisions and substantive law are both enhanced because outside influence, seeking to satisfy its own interests only and potentially distorting an entire line of cases, is minimized. Accountability further contributes to the quality of the judiciary by penalizing poor service and unethical behavior that might otherwise flourish.<sup>108</sup>

A relatively new development, the value of diversity has increasingly become a stated goal of the legal bar.<sup>109</sup> A presidential initiated report of the American Bar Association explains that "lawyers and judges have a unique responsibility *for sustaining a political system with broad participation by all its citizens,*" and notes that a diverse bar instills trust and legitimacy for government and the rule of law. This sentiment is made more important in a country projected to be a majority minority country in less than forty years.<sup>110</sup> That is, questions of representation and inclusion matter in a democracy.<sup>111</sup> Further, in the context of the courts specifically,

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105. *Id.* at 456.

106. Miller, *supra* note 101, at 456; Rachel Paine Caufield, *Inside Merit Selection: A National Survey of Judicial Nominating Commissions*, DRAKE UNIV. DEP'T OF POLITICS AND INT'L RELATIONS 5, 5 (2012).

107. Miller, *supra* not 101, at 456.

108. Miller, *supra* note 101, at 77.

109. See e.g., Cie Armstead, *American Bar Ass'n Presidential Diversity Initiative, Diversity in the Legal Profession: The Next Steps* 6 (April 2010), available at [http://www.americanbarfoundation.org/uploads/cms/documents/aba\\_diversity\\_report\\_2010.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/aba_diversity_report_2010.pdf). See also e.g., *Legal Profession Increasingly Recognizes Diversity as Critical Issue*, University of Virginia School of Law (Mar. 29, 2004), [https://www.law.virginia.edu/html/news/2004\\_spr/diversity\\_legal.htm](https://www.law.virginia.edu/html/news/2004_spr/diversity_legal.htm)

110. *Diversity as a Critical Issue*, *supra* note 109, at 6.

111. See generally CTR. FOR JUSTICE, LAW AND SOC'Y AT GEORGE MASON UNIV., *IMPROVING DIVERSITY ON THE STATE COURTS: A REPORT FROM THE BENCH* 6 (2009) (noting also that a diverse bench may provide models for young lawyers who may be



judges have a duty to be open and responsive to all, to “dispense justice fairly and [to] administer the laws equally,” a process that is subject to public doubt where the institution itself is exclusionary and segregated.<sup>112</sup> Thus, the judiciary should reflect the diversity of the people it serves.

In addition, an important argument for judicial diversity is its relationship to quality. However, this is quality in a second sense; namely, the quality of judicial decision-making as a process and thus the quality of the decisions. Here, diversity is said to improve the process of decision-making because it brings different perspectives, experiences, and interpretations of law to bear on decision-making, on the decisions themselves, and on awareness of the potential impact decisions may have on different communities.<sup>113</sup> Recent studies have shown that diverse groups perform better (and quicker) at solving problems, particularly complex problems, and are superior at predicting outcomes.<sup>114</sup> Professor Page suggests that performance is enhanced because in diverse groups, different people bring different perspectives, frames of reference (organizing categories), tools, and problem solving skills to the table.<sup>115</sup>

How to balance the competing goals of judicial independence and accountability in a democratic order has been the focus of debate for many

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encouraged to become judges). *See also* Sylvia R. Lazos, *Only Skin Deep: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1424 (2008); Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252, 1258-59 (2006).

112. CTR. FOR JUSTICE, *supra* note 111, at 6.

113. *Id.* *See also* Onwuachi-Willig, *supra* note 111, at 1263, 1265; Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 (2013) (arguing that judicial benches without members who know or at least can imagine economic disadvantage are probably more likely to make decisions that burden poor people). *But see*, Lazos, *supra* note 111, at 1432 (questioning whether judges of color are rendering distinctively different decisions, given the political nature of appointments, and explaining that adding diverse judges to the bench plays multiple roles and potentially improves decision-making).

114. *See* Robert Burgoyne, et al., *Navigating a Complex Landscape to Foster Greater Faculty and Student Diversity in Higher Education*, AM. ASS'N FOR THE ADVANCEMENT OF SCI. 12 (2010) (finding that students learn more and the workforce is more productive and successful in a broadly diverse setting). *See also* Patricia Gurin, et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 330-36 (2002); Helen Lippman, *Variety Is the Spice of a Great Workforce*, BUS. & HEALTH ARCHIVE (May 1, 2000); Somnath Saha et al., *Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in US Medical Schools*, 10 JAMA 1135, 1141 (2008); SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS AND SOCIETIES* 314 (Princeton Univ. Press ed. 2008).

115. PAGE, *supra* note 114, at 328 (Princeton Univ. Press ed. 2008) (discussing cross cultural/national diversity primarily).

years.<sup>116</sup> Ensuring these, as well as, the diversity and quality of judges on the bench are additional goals that the various systems for the selection and disciplining of judges, in varying degrees, seek to address.

#### *A. Selection and Promotion of State Judges*

Judicial selection processes vary considerably by state and invariably build on three basic models involving elections, appointments, or merit-based systems.<sup>117</sup> In addition, states may combine certain features of different models or use different models at different levels of the judiciary (final, intermediate, and trial).<sup>118</sup> As such, most state selection processes are unique. Generally, elections may be partisan or nonpartisan. In nonpartisan judicial elections, the candidates appear on the ballot without any party affiliation.<sup>119</sup> In contrast, partisan elections include a candidate's party affiliation provided on the ballot. In the appointment model, the state executive (or governor) appoints judges to the bench. Similar in some ways to the federal system,<sup>120</sup> some states require that the state senate

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116. See Paul Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 80 (1998). See also John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 381 (1999); Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 558 (1999); Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 711 (1997); Alex Kozinski, *The Many Faces of Judicial Independence*, 14 GA. ST. U. L. REV. 861, 872-73 (1998); Sandra Day O'Connor, *Judicial Accountability Must Safeguard, not Threaten, Judicial Independence: An Introduction*, 48 DENV. U. L. REV. 1, 2 (2008); David Pimentel, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity*, 57 CLEV. ST. L. REV. 1, 6 (2009); Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959).

117. LAWYERS COMM., *supra* note 52, at 3.

118. *Id.* at 8; See also *American Judicature Society, Merit Selection: The Best Way to Choose the Best Judge*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.com/uploads/documents/ms\\_descrip\\_1185462202120.pdf](http://www.judicialselection.com/uploads/documents/ms_descrip_1185462202120.pdf) (last visited March 2, 2014) [hereinafter *Merit Selection*].

119. See *Merit Selection*, *supra* note 118.

120. In the federal system, except for federal magistrates and non-Article III judges (such as tax court judges), federal judges are appointed by the President of the United States and confirmed by the U.S. Senate, pursuant to the Appointments Clause in Article II of the U.S. Constitution. See U.S. CONST. art. II, § 2. Vetting of presidential nominees for federal courts happens at multiple levels. The Presidential staff first interviews and vets judicial nominees and then the Senate Judiciary Committee vets a nominee generally through a public hearing (especially for Supreme Court nominees) before it votes to confirm a judicial appointment. See *How the Federal Courts are Organized, Federal Judges and How They Get Appointed*, FED. JUD. CTR., <http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu3c&page=/fede>

confirm the governor's appointment.<sup>121</sup> Merit-based systems often involve both a governor appointing judges and elections.<sup>122</sup> Under the merit model, however, the governor is restricted to appointing judges from a list of candidates recommended by a judicial nominating commission.<sup>123</sup> This commission is responsible for soliciting applications, evaluating and interviewing the judicial applicants, and selecting and placing a limited number of "nominated" candidates on the list from which the governor must appoint for a particular judicial position.<sup>124</sup> Thus, the judicial nominating commission is the key to the judicial merit model.<sup>125</sup> Once appointed, the judge in this model must stand for a retention election; one in which voters are asked to vote yes or no on the question of whether the judge should be retained.

In 1940, Missouri adopted the first merit-based judicial selection plan in the United States. The Missouri Plan, however, only covers the large metropolitan areas in Missouri, whereas the state uses elections for selecting judges in areas not covered by the Plan.<sup>126</sup> Although no two state plans are identical, currently thirty-six states and the District of Columbia use a merit-based system for selection for some or all of its judges.<sup>127</sup>

The American Judiciary Society (AJS), among others, recommends that states use merit-based systems to select and promote judges.<sup>128</sup> It suggests that merit systems not only foster the independence of judges but also are better at promoting—in a third sense—the quality of judges and the judiciary. Because the nominating committees assess judicial candidates, it seeks to assess not only the integrity and potential impartiality of judges but also other characteristics, such as knowledge of the law and temperament.<sup>129</sup> These other types of characteristics, theoretically, also

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ral/courts.nsf/page/A783011AF949B6BF85256B35004AD214?opendocument (last visited May 19, 2014) (explaining the disciplinary process of the federal judiciary).

121. See Jona Goldschmidt, *Merit Selection: Current Status, Procedures & Issues*, 49 U. MIAMI L. REV. 1, 9-10 (1994).

122. See *id.* at 10.

123. *Id.*

124. *Id.*; *Merit Selection*, *supra* note 118. See generally, Caufield, *Inside Merit Selection*, *supra* note 106.

125. Caufield, *Inside Merit Selection*, *supra* note 106, at 5 (citing ALLAN ASHMAN AND JAMES J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 12 (1974)).

126. See *Judicial Selection in the States: Missouri*, *supra* note 9.

127. See Caufield, *supra* note 106, at 2, 5.

128. See K.O. Myers, *Merit Selection and Diversity on the Bench*, 46 IND. L. REV. 43, 43 (2013).

129. See *id.* at 46, 48 n.40.

contribute to the quality of decisions, to which a diversity of perspectives is also meant to contribute. Judicial elections, some argue, do not necessarily ensure knowledge and temperament capabilities, as the voting population may be unaware or uninformed about a candidate's legal ability and credentials.<sup>130</sup>

Regarding diversity, recent studies exploring the relationship between diversity and judicial selection processes generally conclude that none of the selection processes is superior to the others in rendering a more diverse bench.<sup>131</sup> However, Myers suggests that the use of judicial nominating commissions has one advantage, in terms of diversity, over election and appointment processes. This advantage is that states through statutes or the commissions themselves can identify diversity as an institutional priority.<sup>132</sup>

Again, this centers judicial nominating commissions and renders their composition and priorities important aspects of the analysis.<sup>133</sup> A recent study on nominating commissions presented evidence suggesting that commissions that are themselves diverse, attract a more diverse applicant pool,<sup>134</sup> a factor that has an impact on who and what kinds of people in the final analysis become judges. It also noted that the number of women and people of color serving on nominating commissions has steadily increased over the years,<sup>135</sup> although the number of participating people of color is small and the pace of increase glacial.<sup>136</sup> The report suggests that women are increasingly nominated in numbers in proportion to their numbers in the

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130. Caufield, *supra* note 106, at 4.

131. See Myers, *supra* note 128, at 51, 54-55 (discussing a number of these reports and focusing on the process in Indiana); Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts*, 29 JUST. SYS. J. 47, 67 (2008); Mark S. Hurwitz & Drew Noble Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, 3 ST. POL. & POL'Y Q. 329, 345-46 (2003) [hereinafter *Explaining Judicial Diversity*]; Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84, 92 (2001-2002); Ciara Torres-Spelliscy, Monique Chase & Emma Greenman, *Improving Judicial Diversity*, BRENNAN CTR. FOR JUSTICE 4 (2010), ; Nicholas O. Alozie, *Selection Methods and the Recruitment of Women to State Courts of Last Resort*, 77 SOC. SCI. Q. 110, 122-24 (1996); Nicholas O. Alozie, *Black Representation on State Judiciaries*, 4 SOC. SCI. Q. 69, 984-85 (1988); Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selections Methods*, 71 SOC. SCI. Q. 315, 321 (1990).

132. Myers, *supra* note 128, at 51.

133. *Id.*

134. *Id.* at 52 (discussing Caufield, *supra* note 106).

135. *Id.*

136. *Id.*

population, but nominations of people of color seem dependent on their representation in the applicant pool (who actually applies), even though nominating commissions may be charged with soliciting applications from qualified applicants.<sup>137</sup> However, the study found that diversity in general was a low priority for most nominating commissions.<sup>138</sup>

*B. Judicial Disciplinary Procedures*<sup>139</sup>

All fifty states have a judicial disciplinary body, referred to here as commissions.<sup>140</sup> States call commissions by a variety of names.<sup>141</sup> These commissions receive complaints from the public, investigate the complaints, hold hearings, and either impose sanctions or recommend the imposition of sanctions to a state supreme court, which often makes the final determination.<sup>142</sup> Generally, the primary purpose of disciplinary procedures is to protect the public, deter future judicial misconduct, and at the same time, protect the independence of the judiciary.<sup>143</sup> As such, the purpose of disciplinary procedures is not to punish *per se*. Rather, their overall purpose is to ensure the integrity of the judiciary and preserve public confidence in it.<sup>144</sup>

As one of the purposes of judicial administration is to protect judicial independence, disciplinary commissions' jurisdiction is restricted. The grounds for discipline are generally limited to willful misconduct or conduct prejudicial to the administration of justice. As Cynthia Gray elaborates, these and other grounds include:

[T]he willful misconduct in office, conduct prejudicial to the

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137. *Id.*

138. *Id.*

139. Federal judges can also be disciplined. Disciplinary measures include informal measures as well as formal measures, such as censure or reprimand. However, generally these judges can only be removed if impeached by the House and convicted of an offense by the Senate. *See* U.S. CONST. art. I, § 2, 3; art. II, § 4; art III, § 1. *See also* JUDICIAL CONDUCT AND DISCIPLINE IN THE UNITED STATES FEDERAL COURTS: PREVENTING MISCONDUCT, [http://www.fjc.gov/public/pdf.nsf/lookup/Jud\\_Conduct\\_Discipline\\_English\\_2010.pdf/\\$file/Jud\\_Conduct\\_Discipline\\_English\\_2010.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Jud_Conduct_Discipline_English_2010.pdf/$file/Jud_Conduct_Discipline_English_2010.pdf) (last visited May 21, 2014) [Hereinafter JUDICIAL CONDUCT AND DISCIPLINE] (summarizing the disciplinary steps of the Judicial Conduct and Disabilities Act of 1980).

140. Cynthia Gray, *Judicial Conduct Commissions: How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 405 (2007).

141. *Id.*

142. *Id.* at 405, 414.

143. *Id.* at 405.

144. *Id.*

administration of justice that brings the judicial office into disrepute, persistent failure to perform judicial duties, habitual intemperance, and conviction of a crime. In some states, a significant violation of the code of judicial conduct, adopted by each state's high court, is automatically considered misconduct in office or conduct prejudicial to the administration of justice.<sup>145</sup>

Due to jurisdictional limits, commissions dismiss over 90% of the complaints brought against judges<sup>146</sup> (and complaints remain confidential in most states).<sup>147</sup> The majority of these dismissals involve complaints that the judge made an error of fact, of law, or abused discretion.<sup>148</sup> Except in the case where a litigant can demonstrate a pattern of errors, these claims must be handled by legal appeal to a higher court.

A state's constitution, statute, or court rules may establish a disciplinary commission.<sup>149</sup> Most commissions across the states are comprised of seven to eleven members, but may have as many as twenty-eight or as few as five commissioners.<sup>150</sup> State commissions are often composed of a combination of judges, lawyers, and laypeople. In some states, the state supreme court appoints the judges to the commission, the state bar selects the lawyers, and the governor appoints the lay members. However, appointment of commissioners varies. For instance, the governor or the legislature may appoint all commissioners. In a few states, the commission itself or the review process is bifurcated, such that the commission has two panels, one which investigates a complaint and one which adjudicates the case; or there are two separate commissions, again, one for investigating and prosecuting a case and the other for hearing the case once the investigatory commission recommends that it go forward.

All fifty states require that commission proceedings remain confidential, at least during the investigatory stage.<sup>151</sup> Confidentiality seeks both to protect an individual complainant from possible retaliation by the judge and to encourage the public to file complaints against misbehaving judges.<sup>152</sup> At the same time, confidentiality protects judges against frivolous or unwarranted complaints, which might unfairly tarnish their reputations. Neither the commissioners nor their staff can reveal that a

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145. *Id.* at 406.

146. *See id.* at 408.

147. *Id.* at 408-9.

148. *See id.* at 408.

149. *Id.* at 406.

150. *Id.*

151. *Id.* at 409.

152. *Id.* at 410.

particular person has lodged a complaint against a judge nor reveal that a judge is the subject of an investigation. However, in most states the complainant can choose to reveal that she has filed a complaint.<sup>153</sup>

If a commission finds that a judge has engaged in misconduct, states have a variety of private and public sanctions that they may impose. Although sanctions vary among states, most have some form of private and public reprimand.<sup>154</sup> However, at any stage of the disciplinary process, an informal process can be initiated in which a judge may admit to misconduct in exchange for an agreed upon sanction. These sanctions also range from private and public reprimands to an agreement to resign in lieu of continuing the formal proceeding.

Disciplinary procedures and judicial selection processes, as well as other mechanisms such as long tenure for judges and performance evaluations, are just some of the mechanisms states use to promote the independence, accountability, quality, and diversity of judges and state judicial systems.

### III. THE STATE BENCH NATIONALLY AND THE DATABASE

#### *A. Brief Look at the State Bench*

As of 2012, there were total of 17,367 state judges.<sup>155</sup> From the table below, it is clear that the number of state judges has steadily increased over the past decade or so with an addition of almost 1000 judges since 2005, despite the slight dip in numbers in 2012.<sup>156</sup>

Table 1<sup>157</sup>

Number of Judges on the State Bench by Year								
Year	2005	2006	2007	2008	2009	2010	2011	2012
Number of State Judges	16,426	16,641	16,805	16,950	17,115	17,375	17,459	17,367

153. *Id.*

154. *Id.* at 415.

155. 1 THE AMERICAN BENCH, *supra* note 57. The American Bench stops tallying the numbers of judges in May of the preceding year. Thus, the 2013 volume tallies the number of judges as of May 2012.

156. It may be that the dip in the 2012 numbers reflects the 2008 financial crisis, the subsequent contraction of opportunities in the legal field, and state financial trouble. However, this is speculation and it will be interesting to see if the decline continues.

157. 1 THE AMERICAN BENCH, *supra* note 57.

Of this number, 12,459 were men and 4,908 were women.<sup>158</sup> Generally more is known about the gender composition of the state bench than the racial composition of it because Forster, Inc., producers of the directory entitled “The American Bench,” began producing a gender report as of 2006 (for the year 2005). Women as a percentage of the state courts have steadily increased as the chart below demonstrates.

Table 2<sup>159</sup>

Gender Breakdown of Judges on the State Bench by Year											
Date	Final Court		Intermediate		General		Limited Jurisdiction		Totals		Total
	M	F	M	F	M	F	M	F	M	F	
2005	255	98	680	249	8014	2133	3598	1399	12,547	3879	16,426
2006	257	102	681	250	8093	2237	3601	1420	12,632	4009	16,641
2007	256	106	668	264	8074	2332	3628	1477	12,626	4179	16,805
2008	255	104	647	279	8123	2440	3600	1502	12,625	4325	16,950
2009	248	118	641	294	8097	2557	3601	1559	12,589	4528	17,115
2010	254	113	651	309	8190	2657	3587	1614	12,682	4693	17,375
2011	245	116	661	316	8281	2768	3476	1596	12,663	4796	17,459
2012	235	120	642	315	8185	2893	3397	1580	12,459	4908	17367

While the number of women on the state bench has increased, it appears that the number of judges of color has decreased. A report based on ABA data in the year 2000 reports that judges of color constituted 10.1% of the state bench,<sup>160</sup> but the ABA in 2010 reports that judges of color constitute

158. 1 THE AMERICAN BENCH, *supra* note 57. These numbers are found in the gender report which also includes federal judges. The federal judges are subtracted to get these figures.

159. Table 2: Gender Breakdown of Judges on the State Bench by Year. This table represents a compilation of information from the gender report in the AMERICAN BENCH from years 2006 to 2013. See 1 THE AMERICAN BENCH, *supra* note 57.

160. LAWYERS COMM., *supra* note 52, at 8; ABA Database on Judicial Diversity,



only 8.3% of the bench. In comparing Reddick, Nelson and Caufield's report on judicial diversity in 2008 to the ABA 2010 report, this potential decrease is supported.<sup>161</sup> The comparison reveals that the percentage of judges of color in 2010 had decreased in twenty-three states including New York, with two states dropping down to 0%, even as an additional five states remained at 0% of judges of color.<sup>162</sup> Both California and New Mexico, however, increased their percentage of judges of color significantly.<sup>163</sup>

This article uses 2010 as its base year. For instance, this article uses the figure of 27% to refer to the percentage of women judges that comprise the state bench. This is the percentage of women judges on state courts for the year 2010. There were 17,375 judges in 2010 of which 12,682 were men and 4,693 were women. The 2010 year figures are used for this article because it is the last year the ABA provided any data on judges of color.<sup>164</sup> During that year, there were 1,436 judges of color; and as such, judges of color constituted 8.3% of the state bench. Consequently, there exists a complete data set regarding women and people of color from which to make comparisons.

In short, the data confirms that the judiciary at the state level remains overwhelmingly White and male.<sup>165</sup> Based on 2010 census data, non-Latina/o Whites make up 63% of the population, but comprise approximately 91.7% of those sitting on state judicial benches.<sup>166</sup> Men generally make up approximately 49.1% of the population, but comprise 73% of state judges.<sup>167</sup> Obviously, these numbers, particularly the racial numbers, vary across states. For example, while California is a "majority

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*supra* note 58; 1 THE AMERICAN BENCH, *supra* note 57.

161. Compare REDDICK et al., *supra* note 56, at 4, with *ABA Database on Judicial Diversity*, *supra* note 58.

162. *ABA Database on Judicial Diversity*, *supra* note 58. In 2010, North Dakota and Rhode Island reported zero judges of color, down from 2.1% and 7.4%, respectively, in 2008. Admittedly, this may represent only one to two judges, who may have retired. Maine, Montana, New Hampshire, Vermont and Wyoming remained at 0%.

163. *Id.* California's percentage of judges of color increased from 10.6% to 23%; New Mexico's from 16.2% to 30%.

164. *ABA Database on Judicial Diversity*, *supra* note 58.

165. See generally *ABA Database on Judicial Diversity*, *supra* note 58; 1 THE AMERICAN BENCH, *supra* note 57.

166. *State & Country Quick Facts*, U.S. CENSUS BUREAU (Mar. 17, 2014, 9:53 PM) <http://quickfacts.census.gov/qfd/states/00000.html>.

167. Lindsay M. Howden & Julia A. Meyer, *Age and Sex Composition: 2010 Census Briefs*, U.S. CENSUS BUREAU 2 (May 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

minority” state, states such as Iowa, Maine, and West Virginia are composed of a population that is over 90% White. The tables below reflect these statistics.

Table 3<sup>168</sup>

<b>Racial Breakdown of Judges on the State Bench</b>		
Race	Population	State Bench
Non-Latina/o White	63%	91.7% (15,939)
People of Color	37%	8.3% (1,436)
Total	100%	100% (17,375)

Table 4<sup>169</sup>

<b>Gender Breakdown of Judges on the State Bench</b>		
Gender	Population	State Bench
Women	50.9%	27% (4,693)
Men	49.1%	73% (12,682)
Total	100%	100% (17,375)

White men constitute about 31% of the population. However, they represent more than double this number in terms of state judges at 67.9%

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168. *State & Country Quick Facts*, U.S. CENSUS BUREAU (Mar. 17, 2014, 9:53 PM) <http://quickfacts.census.gov/qfd/states/00000.html>; 1 THE AMERICAN BENCH, *supra* note 57 (2012) (including 2011 data representing 2010); and *ABA Database on Judicial Diversity*, *supra* note 58.

169. *2010 Census Briefs*, U.S. CENSUS BUREAU (May 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>; 1 THE AMERICAN BENCH, *supra* note 57 (2012) (including 2011 data representing 2010).

(rounded up).

Table 5<sup>170</sup>

<b>Racial and Gender Breakdown of Judges on the State Bench</b>		
Race/Gender	Population	Bench (17,375)
White men	31.0%	67.88% (11,794)
White women	32.0%	23.86% (4,145)
Men of color	18.2%	5.11% (888)
Women of color	18.8%	3.15% (548)

Women and people of color are not just underrepresented on state benches in comparison to their numbers in the general population but are also underrepresented in terms of their numbers in the legal bar, a factor that partially shapes the composition of the judiciary. For instance, in 2010 there were over a million lawyers in the United States (1,225,452).<sup>171</sup> Of these, women constituted 31% of all lawyers,<sup>172</sup> and lawyers of color 12%,<sup>173</sup> as compared to 27% and 8.3% on the bench, respectively. It is important to bear in mind that the judiciary is comprised of a very small percentage of (the over one million) lawyers at 3% in 2010, with the vast

170. *Age and Sex Composition: 2010 Census Briefs*, U.S. CENSUS BUREAU (May 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>; 1 THE AMERICAN BENCH, *supra* note 57 (2012) (including 2011 numbers which represent 2010); *ABA Database on Judicial Diversity*, *supra* note 58.

171. 2010 LAWYER DEMOGRAPHICS, A.B.A. MKT. RESEARCH DEP'T., *available at* [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer\\_demographics\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2011.authcheckdam.pdf).

172. *A Current Glance at Women in the Law 2011*, AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION (Jan. 2011), [http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_2011.authcheckdam.pdf).

173. *Lawyer Demographics*, *supra* note 171.

majority of lawyers employed in private practice.<sup>174</sup> As such, there are more than enough women and lawyers of color to take advantage of the opportunities to serve the public as judges.<sup>175</sup>

However, regarding disciplinary actions, the analysis generally turns away from using the overall population as a point of comparison to comparing the incidence of disciplinary action to the actual percentages of judges sitting on the bench. Here the database used contains 1,263 judges disciplined from 2002 to 2012. In any given year, over the eleven years studied, the number of judges disciplined constituted less than 1% of all the judges on the state bench.<sup>176</sup> Consequently, the study deals with relatively small numbers because the number of judges disciplined is small. It is in this context that the study finds racial, ethnic and gender disparities.

### *B. Method for Constructing the Database and Limitations of Study*

#### *1. Foundation of Database*

In constructing the database used in this study, we relied on the American Judicature Society (AJS) database of state judicial discipline case summaries.<sup>177</sup> The AJS database contains some 4000 cases.<sup>178</sup> However, many of the cases represent a single individual case that carried over into multiple years.<sup>179</sup> It also includes a number of First Amendment cases that grew out of discipline cases.<sup>180</sup> The team eliminated all duplicate cases and

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174. *Id.*

175. *See generally id.*

176. CYNTHIA GRAY, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 149 (2002) (making a similar point).

177. *AJS Case Summaries Database, supra note 43.*

178. *Id.*

179. For instance, on November 20, 2002, the Arkansas Judicial Discipline and Disability Commission issued a letter of admonishment to Judge Wendell L. Griffen for violating the Arkansas Code of Judicial Conduct by delivering a speech on March 18, 2002, before the Arkansas Legislative Black Caucus in which the Judge criticized the University of Arkansas and other institutions of higher learning for the lack of people of color among their faculties, staffs and students, and urged the legislators to vote against additional appropriations for the schools. On appeal, the Supreme Court of Arkansas quashed the admonishment in late 2003. However, in the interim, the Judge had filed a complaint in federal district court challenging the constitutionality of the admonishment. The federal court abstained from rendering a ruling dismissing the complaint on a motion to dismiss. Thus this case involves three cases and was reported in two consecutive years in the AJS database. *See Griffen v. Judicial Discipline and Disability Commission*, 130 S.W.2d 524 (Arkansas 2003); *Griffen v. Judicial Discipline and Disability Commission*, 266 F. Supp. 2d 898 (U.S. District Court E.D. Arkansas 2003). This however, was not the end of the story. *See infra note 177.*

180. For instance, Arkansas Judge Wendell Griffen again was charged with various

all constitutional cases from the database, even though we noted when a case was reported and appeared in multiple years. Finally we eliminated some judicial election campaign cases, which did not involve sitting judges (mostly in Nebraska). In the end, the team focused on the number of individual judges subject to disciplinary actions, such that there were 1,263 judges whose disciplinary cases were included in the database. In other words, the database contained 1,263 entries.

For each entry, the database included information on the year a judge's case was finally resolved; the judge's first and last name; the state in which the judge presided; the judge's racial/ethnic status (as well as "minority" status), and gender status. The database also coded for the type of misconduct charged, the number of charges (or commission findings), the sanction imposed, if any, and whether or not administrative malfeasance was a basis for a sanction (considered only in cases of removal). Thus, the database plots a number of variables through which analyses could be conducted. The database was constructed to also include information about the number of years a judge had been on the bench, as an indication of experience, the type of court in which the judge presided, and the number of complaints. However, this information was ultimately not fully collected and entered into the database.

AJS's case summary database provided a list of the twenty-six types of misconduct for which judges are typically charged, as well as, a list of the range of state imposed sanctions. The database constructed for this study relies on these categories, as provided below.

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violations of the Arkansas Code of Judicial Conduct, more expansive than those with which he had been charged in 2002 and 2003. These charges were based on public statements and writings he authored criticizing the federal government's handling of hurricane Katrina, the Iraqi war, the Presidential nomination of Justice Roberts for Chief Justice of the U.S. Supreme Court, and certain anti-immigration and homophobic statements of others. After a hearing for probable cause, the Arkansas Judicial Discipline and Disability Commission granted his request for summary judgment and dismissed the charges. *See* Griffen v. Judicial Discipline and Disability Commission (Arkansas Supreme Court January 25, 2007) (granting request that the formal hearing for probable cause be open to the public and the media); *In re* Griffen, Final Decision and Order (Arkansas Judicial Discipline and Disability Commission September 27, 2007) (charges based on judges' statements dismissed). Out of this disciplinary case, as before in 2003, several constitutional challenges were lodged in federal court, one of which was reported in the AJS summary. *See e.g.*, Griffen v. Judicial Discipline and Disability Commission (E.D. Ark. October 24, 2007) (challenging dismissed charges). Because these types of constitutional challenges arise out of the disciplinary hearings and represent the same case surrounding a single judge, they were eliminated from the database.

**Judicial Misconduct:**<sup>181</sup>

1. Demeanor, Partiality, and Comments on the Bench
2. Presiding While Intoxicated
3. Ex Parte Communications
4. Disqualification
5. Failure to Follow the Law; Legal Error; Abuse of Discretion
6. Abuse of Contempt Power
7. Ticket-Fixing
8. Disagreements with Other Judges
9. On-Bench Abuse of Power; Favoritism
10. Sexual Misconduct
11. Administrative Failures/Treatment of Court Staff/Improper Delegation
12. Using Court Resources for Personal Business
13. Delay; Diligence
14. Financial Disclosure Statements
15. Misrepresentations
16. Failure to Comply With Education Requirements
17. Conduct Unique to Part-Time Judges
18. Personal Conduct
19. Dishonest Conduct
20. Attempting To Obtain Favorable Treatment; Off-Bench Use of Prestige of Office
21. Driving While Intoxicated (DWI)
22. Criminal Conduct
23. Campaign Conduct
24. Political Conduct Not Related to Judge's Own Judicial Campaign
25. First Amendment Challenges
26. Failure to Cooperate With Commission; Lying To Commission; Asking Witness to Lie; Retaliating Against Complainant
27. Miscellaneous
28. Undisclosed

**Judicial Sanctions:**<sup>182</sup>

- A. Removal
- B. Order to retire or resign in lieu of discipline

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181. *See, e.g.*, GRAY, *supra* note 140.

182. *Id.* at 91-8.

- C. Removed or suspended for disability
- D. Barred from serving in judicial office
- E. Suspension without pay
- F. Suspension
- G. Publicly Censured
- H. Publicly Reprimanded
- I. Publicly Admonished
- J. Public warning
- K. Privately reprimanded or admonished
- L. Advisory letter
- M. Civil penalties/fine
- N. Sanctioned in attorney discipline while judge

## *2. Challenges in Constructing the Database*

The AJS Judicial Ethics Center database of judicial misconduct case summaries was a goldmine; it compiles in one place the vast majority of state judicial discipline cases and provides a synopsis of each. It proved invaluable to this project. Nonetheless, constructing the database for the purposes of this study proved arduous. The first challenge with working with the AJS case summaries was that the summaries provided only the last name of the judge and the state in which the case arose, presumably where a judge presided. Often, the case summaries also provided a case cite, which allowed us to go to any original published case. What this meant, however, was that it was first necessary to go to each judge's individual case or to a state's judicial website to find the first name of the judge. The second challenge was that the case summaries, as organized, included many references to a single case over multiple years, as discussed earlier. These had to be whittled down in order to figure out just how many judges were actually disciplined.<sup>183</sup>

The third challenge of working with the AJS case summary database, as explained, was that it neither provided the racial nor gender status of the judges. This meant that we had to go to a host of other sources to try to collect such information. This was extremely challenging, particularly with regard to racial status. Sometimes the actual case mentioned a judge's racial status, especially if bias was alleged in the complaint or was a feature of the judge or another's response to the case. But in most cases, we were reduced to combing biographical information to see if a judge self-identified as a person of color; combing state websites to see if they contained reports that provided this information; calling the American Bar Association and the National Council on State Judges, among other

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183. *AJS Case Summaries Database*, *supra* note 43.

organizations to see if they might have racial status information on a particular judge; and, searching Judgepedia and the Internet generally for mention of the judges on the list. The latter technique proved fairly helpful.

Often, a judge's disciplinary proceeding had been covered by the media. In this media coverage, it sometimes mentioned the judge's racial status (particularly in cases where the judge was the first judge from his or her ethnic or racial group on the bench) or the coverage provided a picture of the judge.<sup>184</sup> Also, in election states, the media sometimes covered judicial elections, providing biographical information or a picture of the judicial candidate.<sup>185</sup> Assessing the racial status of a judge by his or her picture is risky business. Unless we had some other corroborating evidence of a judge's racial status, we categorized the judge as White. This occurred more often in the case of African-American status.

Sometimes the initial evidence of a judge's race or ethnicity was simply the name of the judge, particularly in the case of Latina/o/Hispanic ethnicity. In order to corroborate these statuses, the team first combed the ABA's directory on minority judges published in both 2001 and 2008. This proved helpful. The team then turned to the various resources provided through the Internet. Finally, there were still a number of judges whose names hinted at Latina/o/Hispanic descent. Here we turned to the states in which these judges presided and approached the state judicial offices, as well as, minority or Latina/o/Hispanic bar associations in an attempt to confirm a judge's status. Some of the states approached included Arizona,<sup>186</sup> New Jersey,<sup>187</sup> New Mexico,<sup>188</sup> and Texas,<sup>189</sup> where

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184. On several occasions it was the "comments" section on a particular media article that allowed us to discover the racial status of a judge. So for instance, in a search about a disciplined judge who we thought might be Latina/o/Hispanic, an individual commented that he was waiting for the judge to "play the race card." In another example, an entire diatribe against a judge in disciplinary proceedings appeared on the website of a hate group. The writer referred to the judge as a "Black baboon" among other things.

185. We found a couple of African-American judges through election campaign electronic fliers or webpages.

186. *Administrative Services*, ARIZ. JUDICIAL BRANCH, <http://www.azcourts.gov/adminservices/Home.aspx> (last visited May 1, 2014).

187. N.J. COURTS ONLINE, <http://www.judiciary.state.nj.us/> (last visited May 21, 2014); *Advisory Committee on Judicial Discipline*, N.J. COURTS, <http://www.judiciary.state.nj.us/acjc/> (last visited May 21, 2014) [Hereinafter *Advisory Comm.*].

188. *What's New?*, N.M. COURTS: THE JUDICIAL BRANCH OF N.M., <http://www.nmcourts.com/index.php> (last visited May 21, 2014); *Welcome to Human Resources*, N.M. COURTS: THE JUDICIAL BRANCH OF N.M., <http://www.nmcourts.com/newface/hr/index.php> (last visited May 21, 2014)



large populations of people of Latina/o ethnicity reside. A number of these also proved helpful.

For instance, personnel in both the New Mexico and Texas judicial administrative offices were indispensable both in confirming judges' statuses, but also in confirming a number of the team's assumptions. For example, the Texas judicial staff reviewed the entire list we had compiled of Texas judges who had faced disciplinary action.<sup>190</sup> Of those for whom they had records and identified their racial/ethnic status, they confirmed that the team had not made a single error in those it had identified as having minority status. This helped to validate our research methods. Second, they confirmed our suspicion that African Americans were likely undercounted in the database. That is, the Texas administrative staff identified two additional African American judges among those who had been listed as "White" in the database. Third, their review confounded our suspicion that Latina/o/Hispanics judges were likely over-counted in the database because their review added two additional Latina/o/Hispanic judges, along with one judge who identified as "other" (likely bi or multi-racial). In addition, the Texan staff identified another judge as either Native American or Native Alaskan – all of whom were initially listed as White judges who had faced disciplinary action.

Nevertheless, there still existed a handful of judges whose ethnicity could not be fully confirmed. Here, unlike the practice used with reference to African Americans and Asian Americans, the team used its best judgment based on the evidence found in deciding in which category to place a particular judge. For instance, a Judge Lopez listed in Wyoming was classified as White because the ABA 2010 report listed Wyoming as having no Latina/o/Hispanic judges on the bench at the time, a time when he supposedly was a sitting judge.<sup>191</sup>

Discerning the gender status of the judges proved much easier in part because we could rely on the name of the judge. However, there are gender-neutral names. A quick review of biographical information, however, often revealed a particular judge as male or female, given the references to "he" or "she."

The fourth challenge the team faced in both collecting for and analyzing the information provided by the database was finding the overall numbers for judges of color and women on the bench. As mentioned earlier, the

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[Hereinafter *Human Resources*).

189. *Court Structure of Texas*, TEX. COURTS ONLINE, <http://www.courts.state.tx.us/> (last visited May 16, 2014).

190. A special thanks again to Ms. Amanda Stities of Texas. Her assistance was invaluable.

191. *ABA Database on Judicial Diversity*, *supra* note 58.

American Bench directory has provided a gender report since 2006, therefore this study includes solid overall numbers for women state judges from 2005 through 2012. However, again, securing overall numbers of the state judges of color for each year proved an almost impossible endeavor. The ABA has periodically provided this information, although not necessarily in an easily accessible form. So for instance, its publications on minority judges includes federal judges, magistrates and a host of other people in judicial positions, rendering the discernment of the number of state court judges, at the general, intermediate, final, and limited jurisdiction court levels, difficult. However, the updated ABA 2010 online report, provided information on these issues, and it is this report, among others, on which this study relies.<sup>192</sup>

### 3. *Limitations of Data and Analysis*

There are several limitations to the study. First, the study focuses attention only on the demographic factors of gender and race. In terms of racial demographics, the study used two categories, one for minority status (yes or no) and one for racial status in which a judge was identified as African American/Black, Asian American, Latina/o/Hispanic and Other.<sup>193</sup> The latter category only represents two judges who were identified as Native American/Alaskan or “Other.” What this means is that although the database takes “Others,” including bi or multi-racial judges into account, if identified, members of these groups are not separated out in the analysis. Regarding gender, the database only reflects women and men, understood in a traditional sense, and thus does not account for those judges who might potentially identify as queer or transgender. Further, the database does not account for sexual orientation; those who might identify as lesbian, gay, bisexual, or transgender, though even the ABA expects the number of lawyers who so identify to grow.<sup>194</sup>

Second, it must be borne in mind that this is a national study. That is, the study aggregates data from different states that have slightly different disciplinary regimes, different levels of funding allocated to ferreting out judicial misconduct, and different demographic profiles. As such, in some sense and in some cases the analysis may well be comparing apples and oranges and then aggregating them. At the same time, however, states

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192. *Id.*

193. For ease, I refer to these groups as Black, Asian, Latina/o and Other. Latina/os stands for both women and men of Hispanic ethnicity, “Latina” includes only women, “Latino” includes only men.

194. Armstead, *supra* note 109, at 5 (noting “[o]ur country is becoming diverse along many dimensions and we expect that the profile of LGBT lawyers and lawyers with disabilities will increase more rapidly”).

share certain similarities. For instance, all fifty states have judicial disciplinary processes, and they share a national culture and set of institutional practices around gender, racial and ethnic disadvantage that may contribute to the type of disparities found. As stated earlier, disparities along these lines are ubiquitous in U.S. society.

Third and importantly, the database and the study, in discussing sanctions, does not account for the number of complaints lodged against a judge, the experience or age of a disciplined judge, the elected as opposed to appointed status of a judge, the size of the court in which the judge sits, or whether a judge has faced previous disciplinary action. Each of these perimeters may be important in comparing the incidence of disciplinary actions, the harshness of the sanctions imposed and whether disparities really exist. As such, this paper represents a first pass on the question of disparities in judicial discipline cases. The data presented is raw and fairly straight forward and thus will benefit from more sophisticated statistical and other analyses in order to determine the full extent of the disparities, as well as causation.

That said, however, the state of California's commission on judicial performance conducted a statistical study on judicial discipline in the state for the years of 1990 through 2009.<sup>195</sup> This study examined several of these variables including judicial experience, age, and number and source of complaints. It found that although the number of complaints per judge had decreased slightly over this period, the number of sanctions imposed had declined significantly.<sup>196</sup> Equally important, an earlier version of the California study suggested that the factors listed above, including the number and source of complaints surprisingly did “*not* appear related to the incident of discipline.”<sup>197</sup>

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195. Summary of Discipline Statistics 1990-2009, State of Cal. Comm'n on Judicial Performance, *available at* [http://cjp.ca.gov/res/docs/miscellaneous/Statistical\\_Report\\_1990-2009.pdf](http://cjp.ca.gov/res/docs/miscellaneous/Statistical_Report_1990-2009.pdf) [Hereinafter *California Summary of Discipline Statistics 1990-2009*]. *See California Summary of Discipline Statistics 1990-1999*, State of Cal. Comm'n on Judicial Performance, *available at* [http://cjp.ca.gov/res/docs/Miscellaneous/Statistical\\_study\\_1990-1999.pdf](http://cjp.ca.gov/res/docs/Miscellaneous/Statistical_study_1990-1999.pdf) (noting that only disciplinary cases involving trial and appellate court judges were reported and that the study did not include subordinate judicial officers).

196. California Summary of Discipline Statistics 1990-2009, *supra* note 195.

197. Summary of Discipline Statistics 1990-2009, State of Cal. Comm'n on Judicial Performance (March 22, 2011) (on file with author and an earlier version of the California Summary of Discipline Statistics 1990-2009). [Hereinafter March 2011 California Report]. *But see*, California Summary of Discipline Statistics 1990-2009, *supra* note 195, at 10-11 (noting the following on age and experience: “[O]ver the long run, the incidence of misconduct is relatively equally distributed across all experience levels. There is a consistently increasing relationship between age and the discipline rates from 2000 to 2009, but the combined decade rates suggest that age does not have

The California study also examined a number of other variables, including gender, in trying to determine its relationship to the incidence of disciplinary action (the report did not examine the relation of racial or ethnicity status to the incidence of discipline).<sup>198</sup> Regarding complaints, the earlier report found that “male and female judges received approximately [an] equal [number of] complaints per judge.”<sup>199</sup> However, the commission found that female judges received less discipline [than men] per complaint.<sup>200</sup> Again, our data suggested similar kinds of results. As compared to their representation on the state bench, we found that women were less often disciplined than their representation on the bench might suggest, significantly so.<sup>201</sup> However, this held true nationally only for White women. Women of color encountered a higher incidence of discipline relative to their representation on the bench, as did men both of color and White.<sup>202</sup>

Finally, the California Commission also tested for several other parameters including whether the judge had been initially *elected* as opposed to appointed; whether the judge sat on a small court; and whether the judge had previously received discipline.<sup>203</sup> These factors indeed appeared to be related to the incidence of disciplinary action.<sup>204</sup> That judges who were initially elected appeared to have an higher incident of disciplinary cases, might well be seen as support for the proposition that merit-based or appointive systems better screen for the value of quality in judges; quality both in terms of integrity and impartiality but also perhaps in terms of certain characteristics, such as knowledge of the law and temperament (facets that the public may not adequately ascertain).<sup>205</sup>

Here we did not include these factors in any consistent way. However, the Texas judicial administrative office did provide information on the level of court on which judges served. One notable factor that came out of this information that relates to responsibilities which may occasionally relate to court size was that a significant number of justices of the peace,

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a large influence on discipline”).

198. California Summary of Discipline Statistics 1990-2009, *supra* note 195, at 5.

199. March 2011 California Report *supra* note 197.

200. *Id.* at 8.

201. *See infra* notes 211-13 and accompanying text (discussing gender disparities).

202. *See infra* notes 214-16, 234-43 (showing that women of color were disciplined at a higher rate (relative to their representation on the bench) than both white female and white male judges, but lower than those of judges of color who were men and it is their extremely high removal and resignation rates that are striking.).

203. *See* California Summary of Discipline Statistics 1990-2009, *supra* note 195.

204. *Id.*

205. K.O. Myers, *supra* note 128, at 46.

some 30%, had been subject to disciplinary action. And, the three judges removed from Texas during the period of study were justices of the peace. In Texas, as in New York and a few others states, some justices of peace or village or small town judges may not be lawyers.<sup>206</sup> Legal training or knowledge of the law may thus be an important source of quality control.

Though we would not necessarily expect the decisions, trends, and practices in California to track well across the nation, that they comport with a number of our findings lends support to the idea that states may have more similarities than it might first appear. Thus, some of these trends may in fact track for the entire nation.

Regarding limitations of the database specifically, as alluded to earlier, the database may be under-inclusive in terms of the number of actual African Americans represented and slightly over-inclusive with regard to Latina/os. Further, although the AJS database of case summaries is quite comprehensive, it is likely that it may not account for all judicial discipline cases and in translating the case summaries into a searchable database, the team no doubt made some mistakes that we have yet to find.

#### IV. REPRESENTATION, DISCIPLINE AND REMOVAL

As mentioned earlier, the judiciary at the state level remains overwhelmingly White and male. Therefore, it is not surprising, that non-Latina/o Whites and men represent the highest percentage of those subject to disciplinary proceedings. The total number of judges subject to disciplinary action between the years 2002 and 2012 was 1,263. In terms of racial identity, as the table below indicates, 1,115 of these judges were White (88.3%), in comparison to 148 judges of color or 11.7% of the disciplinary pool. In terms of gender, those subject to disciplinary action were comprised of 1,018 men and 245 women, 80.6% and 19.4%, respectively.

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206. GRAY, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS, *supra* note 176. This was a national study on the discipline cases collected by AJS from 1990-2002. It sought to provide guidance on judicial sanctions in order that they might be more uniform, consistent and fair.

Table 6<sup>207</sup>

<b>Discipline Pool by Race/Ethnicity and Gender</b>			
Gender	Total	Judges of Color (JOC)	White
F	245	45	200
M	1018	103	915
Total	1263	148	

In addition, 120 judges were removed between 2002 and 2012.

#### A. Race and Ethnicity

As the table below indicates, White judges comprise 91.7% of the state bench and the majority of those disciplined. Their incidence of discipline relative to their presence on the bench is 7.0%. In addition, of all White judges disciplined, only 9.2% face the harshest sanction of removal.<sup>208</sup>

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207. This table represents the information compiled and organized in the database, hereinafter referred to as the Judicial Discipline Database. The information is based on the *AJS Case Summaries Database*, *supra* note 43 (on file with author). There are a total of 1,263 judges in database, of which 245 are women and 1,018 are men; and, 148 judges of color and 1115 White judges. There are 45 women judges of color; 200 White women judges; 103 judges of color who are men; and, 915 White judges who are men.

208. However, White judges have a higher incidence of resignations at 12.2% as compared to JOC, at 9.5%.

Table 7<sup>209</sup>

<b>Discipline and Removal by Race/Ethnicity</b>				
Race/ Ethnicity	Population	National State Bench (17,375 judges total)	Incidence of Disciplinary Actions	Removals
White	63%	91.7% (15,939/17,375)	7.0% (1115/ 15,939)	9.1% (101/115)
People of color	37%	8.3% (1436/17,375)	10.3% (148/1436)	12.8% (19/148)

Judges of color (JOC), by contrast and as indicated earlier, comprise 37% of the country’s population, but only represent 8.3% of judges on state benches. That is, they are vastly underrepresented by about 78%. However, although they are vastly under-represented on state benches they are over-represented in disciplinary proceedings. That is, the incident of judicial action involving judges of color relative to their presence on the state bench is 10.3%. Thus, the incidence of discipline for judges of color is significantly higher than those of White judges. In addition, once disciplined, the incidence of removal is 12.8%.

Briefly breaking down the data by group, as JOC only constitute 8.3% of the bench, it is not surprising that the representation of the groups that comprise the JOC category are numerically small. Asian, Blacks, Latina/o, and Other Americans represent a mere 1%; 4.4%; 2.3%, and 0.6%, of the judges on the state bench.

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209. *State & Country Quick Facts*, U.S. CENSUS BUREAU (Mar. 17, 2014, 9:53 PM) <http://quickfacts.census.gov/qfd/states/00000.html>; 1 THE AMERICAN BENCH, *supra* note 57 (including 2011 numbers which represent 2010); *ABA Database on Judicial Diversity*, *supra* note 58; Judicial Discipline Database.

Table 8<sup>210</sup>

<b>Discipline and Removal Broken Down by Racial Subgroups</b>						
Groups	Asian	Black	Latina/o	Other	Total JOC	White
State Bench (17,375)	1% (157)	4.4% (769)	2.3% (408)	0.6% (102)	8.3% (1436)	91.7% (15939)
Incidence of Discipline	6.4% (10)	9.2% (71)	15.9% (65)	0.02% (2)	10.3% (148)	7.05 (1115)
Removal	0.0%	19.7% (14)	7.7% (5)	0.0%	12.8% (148)	9.1% (101)

respectively; as compared to the 91.7% of White judges on the bench. Second, it is the high incident of discipline of both Black (9.2%) and Latina/o judges (15.9%) that drive the disparities between White judges (7.0%) and JOC generally (10.3%). Finally, Asian judges have a lower incidence of discipline than do White judges (6.3% as compared to 7.0%), given their presence on the bench. In terms of removal, it is the Black judges' numbers that are striking. Of the 71 Black judges subject to disciplinary action, 19.7% were removed, as compared to 1115 white judges similarly subject, of whom 9.1% were removed. A Black judge who faced disciplinary action was more than twice as likely than a white judge so subject, to be removed.

#### *B. Gender*

Men generally are more often disciplined than are women, even as they are over-represented on the state bench at 73%.<sup>211</sup> In other words, they are over-represented on the state bench and over-represented among those disciplined. Men's incidence of discipline relative to their presence on the bench is 8.0%. And of all the men disciplined, 9.7% were removed.

Women, in contrast, comprise 50.8% of the population, but only represent 27% of state judges. That is, they are under-represented by about

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210. 1 THE AMERICAN BENCH, *supra* note 57 (including numbers for 2011, representing 2010); *ABA Database on Judicial Diversity*, *supra* note 58 (providing data on people of color broken down by groups); *Judicial Discipline Database*, *supra* note 207.

211. Men are 49.2% of the population.



47%, although that number is declining. Not only are women under-represented on the bench, they are also under-represented among those disciplined, relative to their presence on the bench, at 5.2%. Their incident of removal relative to all women disciplined was 8.6%.<sup>212</sup>

The reality that women are under-represented in terms of discipline comports with the findings of a California study. That study too found that women were disciplined less often than men. In California the lower incidences of discipline were not related to a fewer number of complaints against women as compared to men, nor did they correspond to markedly different conduct in which women or men might have engaged. Rather, the investigators concluded that women were simply disciplined less often. Table nine suggests that women are not only less often disciplined than are men but may also be less severely sanctioned than are men, though further scrutiny suggests otherwise.

Table 9<sup>213</sup>

Discipline and Removal by Gender				
Gender	Population	State Bench Nationally (17375 judges total)	Incidence of Discipline	Removals
Women	<b>50.8%</b>	27.0% (4,693/17,375)	5.2% (245/4,693)	8.6% (21/245)

212. Women though, have a higher incident of resignations at 15.5% than do men at 11%. Of this group, White women have an incident of resignation at 15%, women of color at 17.8%.

213. See *Age and Sex Composition: 2010 Census Briefs*, U.S. CENSUS BUREAU (May 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>; see also *State & Country Quick Facts*, U.S. CENSUS BUREAU (Mar. 17, 2014, 9:53 PM) <http://quickfacts.census.gov/qfd/states/00000.html>.<http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>. 1 THE AMERICAN BENCH, *supra* note 157 (including 2011 which represents data for 2010). *Judicial Discipline Database*, *supra* note 207. The chart reads, for example, as follows: Women comprise 50.8% of the US population but they only comprise 4693 or 27.0% of the 17375 judges on the state bench (4693/17375 = 27.0%). Of the 4693 women judges on the state bench (using 2010 as base year), 245 were disciplined or 5.2% (245/4693 = 5.2%); and of the 245 disciplined, 21 were removed or 8.6% (21/245 = 8.6%).

Men	<b>49.2%</b>	73.0% (12,682/ 17,375)	8.0% (1018/12,682)	9.7% (99/1018)
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However, the California study did not consider race as a factor, and as such did not consider whether women of color shared in this circumstance. According to our data, this finding for “women” did not hold for women of color, a matter to which we turn next.

### C. Intersectional Identity

Table ten parses the data out by race and gender. It illustrates that the percentage of White men sitting on the bench at 67.9% is more than double their representation in the general population. Their incidence of discipline relative to their presence on the bench is 7.8%. Men of color, by contrast, only represent 5.1% of those on the bench, and yet their incidence of discipline relative to their presence is 11.6%, a significant difference as compared to White men. Further, although 9.7% of all men disciplined were removed; 10.7% of male judges of color were removed as compared to 9.6% of White male judges.

Table 10<sup>214</sup>

<b>Intersectional Identity and Removal</b>				
Race/Gender	Population	State Bench (17,375 judges total)	Incidence of Discipline	Removal

214. *Age and Sex Composition: 2010 Census Briefs*, U.S. CENSUS BUREAU (May 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>; see also *State & Country Quick Facts*, U.S. CENSUS BUREAU (Mar. 17, 2014, 9:53 PM) <http://quickfacts.census.gov/qfd/states/00000.html>. The State Bench numbers are taken from the gender report of *The American Bench 2012*, supra note 157 and *ABA Database on Judicial Diversity*, supra note 58 (for women judges of color). The data on discipline was taken from the Judicial Discipline Database, supra note 207. The chart reads, for example, as follows: White men comprise 31% of the US population but they comprise 67.9% or 11794 of the 17375 judges on the state bench (11794/17375 = 67.99%). Of the 11794 white male judges on the state bench (using 2010 as base year), 915 or 7.8% were disciplined (915/11794 = 7.8%); and of the 915 disciplined, 88 or 9.6% were removed (88/915 = 9.6%).

White men	31.0%	67.9% (11,794)	7.8% (915)	9.6% (88)
White women	32.0%	23.85 (4,145)	4.8% (200)	6.5% (13)
Men of color	18.2%	5.1% (888)	11.6% (103)	10.7% (11)
Women of color	18.8%	3.15% (548)	8.2% (45)	17.8% (8)

In examining White women, specifically, it becomes clear that the percentages of White women disciplined and removed pulled the total numbers down for the entire “women” category, as well as the “White” category. In fact, their numbers were markedly lower than their representation on the bench. Though White women represent 23.85% of those on the bench, their incidence of discipline, relative to their presence on the bench, was a low 4.8%, and only 6.5% of them were removed.<sup>215</sup>

However, the conclusion in the California report that “women” judges were disciplined less often than men and the idea that they may also be less severely sanctioned in relation to men did not necessarily hold up for women of color in this study. Women of color, who represent a mere 3.15% of state judges, had a high incidence of discipline relative to their representation on the state bench, at 8.2%. That is, they had an even higher incidence of discipline than did White women and White men but a lower incidence of discipline than did men of color, relative to their presence on the bench.

But more startling, women of color had a significantly higher presence among those removed from the bench, both in relation to their already high incidence of discipline and their presence on the bench but also in relation to the other groups disciplined. A shocking 17.8% of women of color were removed. This compares with an incidence of removal of 10.7% for men of color; 9.6% for White men; and 6.5% for White women. A woman of color who faced disciplinary action was almost twice as likely to have her case end in removal, than were men and almost three times more likely than were White woman.<sup>216</sup> And, it appears that it is the removal of women

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215. However, White women have a higher incident of resignations at 15% than do White men at 11%, but lower than women of color at 17.8%.

216. In addition, women of color have a high incidence of resignation at 17.8%.

of color that drives the removal disparity between judges of color and White judges.

Finally, women of color also had the highest incidence of recorded resignations relative to their incidences of discipline.<sup>217</sup> However, White women also had a high incidence of resignations; a finding that cast doubt on the notion that White women are less severely sanctioned than are men. These findings and others are explored in more detail below.

## V. OBSERVATIONS ON SANCTIONS, CHARGES, AND MISCONDUCT TYPE ACROSS GENDER & RACE

### *A. A Deeper Look at the Distribution of Sanctions*

The previous section provided a picture of the state bench's composition and the disparities that exist in disciplinary actions between judges of color and White judges. It also provided a picture of the discipline disparities between men and women judges. Although men in general face a higher incidence of disciplinary actions than do women and there exist disparities between male judges of color and White male judges, some of the largest disparities between cases involving White judges and judges of color in general, and particularly in the severity of sanctions, are driven by proceedings against women of color.

This section seeks to dig deeper into these numbers and the factors that may in part account for some of these disparities. In addition to reiterating the notion that disciplinary proceedings against women of color significantly contribute to the disparities between judges of color and White judges generally, it finds that women in general, including White women, leave the state bench pursuant to disciplinary action at higher rates than do all men.

At the same time, this section asks, what might the numbers reveal about the imposition of sanctions, the charges brought and the conduct penalized. Said differently, sanctions are not simply imposed, they are imposed in response to charges made and found about violations of certain codes of judicial behavior or otherwise. Thus this section also seeks to provide a fuller picture of the range of sanctions available to states and the ways in which different groups fare under them. It then briefly explores what, if any, impact the number of charges or findings has on the severity of the sanction imposed. And finally it explores, with a broad brush, the impact the nature of the conduct has on the type of sanction imposed.

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217. However, because an agreed-to resignation may occur before charges are filed, it could be that the majority of resignations instigated by disciplinary investigations are not recorded.

*I. Sanctions and Tier Analysis*

*a. Overview of Sanctions*

In terms of sanctions, this study employed the fourteen categories of sanctions identified by the AJS. This list is a compilation of the various sanctions states use. Thus, few, if any states, use all of these sanctions.<sup>218</sup>

However, all states have a removal process, which generally follows a formal hearing in which a judge has been found to have engaged in misconduct.<sup>219</sup> It is the harshest sanction that a state can mete out to a judge, and its harshness is reinforced, in part, because it usually engenders wide public attention. The next level of sanction, resignations involves an agreement between the state and the judge that the judge will resign, often in lieu of further proceedings - a sanction that may avoid some of the attention generated by removal pursuant to a formal hearing. These resignations are more numerous than the pool here suggests because they may occur before any formal charges are brought. Finally there is removal for disability, *or* an order or agreement that the judge will never serve again in a judicial capacity. Most states have these sanctions, all of which result in the loss of the judicial commission and thus the judge leaving the bench.<sup>220</sup>

Most states also have the authority to suspend a judge without pay. This comes with its own hardships as suspensions also tend to garner significant public attention but also render a judge potentially income-less for a period of time. Although most suspensions in this study were for 60 to 90 days, they can be for much longer periods,<sup>221</sup> and being without an income even for 60 days may be a significant hardship.

In addition, all states have some form of public reprimand. It may occur under several different names and a state may have more than one level. These names are censure, reprimand, public admonishment and public warning.<sup>222</sup> All of these are used and ranked in this study following the

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218. See Cynthia Gray, *Judicial Conduct Commissions: How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 415-16 (2007). See also e.g., California Summary of Discipline Statistics 1990-1999, *supra* note 201, at 1 (listing the following sanctions: “advisory letters, public and private admonishments, public reprovals [this eliminated in 1995], public censures and decisions”). See Def. Summation, *In re Campbell*, No. ACJC 2008-317 (N.J. Sup. Ct. Dec. 30, 2009), available at <http://www.judiciary.state.nj.us/pressrel/ACJC%20Campbell%20Closing%20Brief.pdf>.

219. Gray, *supra* note 219.

220. *Id.* at 416. Removal for disability may not carry the same sort of stigma, and presumably a judge continues to retain his judicial title after leaving office.

221. *Id.*

222. *Id.* at 414.

lead of AJS. Finally, there are a number of private sanctions, some of which never become public.<sup>223</sup>

The most commonly used public sanction by states, as this study demonstrates, is a form of the reprimand. Because a state likely does not use all the different forms of public reprimands – censure, reprimand, admonishment and warning - for the purposes of this study, two sets of reprimands have been assumed. Further, the sanctions have been divided into a 5-Tier ranked system to facilitate analysis.

*b. Tier Analysis*

This study provides the data for all of the fourteen sanctions listed. However, it also provides a tier analysis. In the tier analysis, this study combines and reduces the various possible state sanctions into just five levels or tiers. Doing so facilitates analysis by making the information easier to grasp. It may also more realistically capture the choices states make given that most states use fewer sanctions than listed.

The first tier includes the harshest sanctions resulting in the loss of the judicial commission, including removal orders (“A”), forced retirement/resignation agreements (“B”), and the combined category of disability removal/barred from serving in a judicial capacity (“C/D”). The latter category, “C/D” only represents ten records and therefore does not feature prominently in the analysis. The second tier only includes suspension (“E”) in part because of the unique hardships suspension engenders in the temporary loss of income. The third tier includes the public censure (“G”) and public reprimand (“H”); presumably a harsher public condemnation of misconduct than the next level of public reprimand. The fourth tier includes the public admonishment (“I”) and the public warning (“J”); presumably a milder form of disapproval. Finally, the various *private* warnings and actions comprise tier five as “K,” “L,” “M,” “N” and “P.”

One of the disadvantages of the tier approach is that it in some ways both masks and reduces the significance of removals because it combines it with other sanctions. An advantage of the approach is that it brings into focus resignations and other sanctions, which also have the effect of forcing judges to leave the bench. These advantages and disadvantages affect the analysis of cases involving Black Judges and Latina/o judges, in particular, differentially and is an important part of the story surrounding people of color as a group.

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223. Some states report private actions by simply noting and thus acknowledging that they occur.

*2. Distribution of Sanctions: Racial/ Ethnic and Gender Group Comparisons*

*a. Racial/Ethnic Group Distributions*

The paper thus far primarily has considered the misconduct pool broken down between two groups white judges and judges of color on the one hand and men and women judges on the other. The numbers at this level of analysis are likely statistically significant. However, this section further breaks down the judges of color category into its constituent groups (Black, Latina/o, Asian and Other). These numbers tend to be too small (often single digits) to render statistically meaningful statements and consequently constitute mere observations about the pool. Further, as mentioned earlier, the findings representing the comparison between even judges of color and White judges reveal disparities, not causation.

Table 11 displays the data for the different judges of color groups. At first glance it becomes clear that cases against White judges form the majority of the pool, 1115 judges out of 1263 (88.3%). Second, Black and Latina/o judges comprise the largest groups of judges of color, with seventy-one and sixty-five cases, respectively. Further, for Black and Latina/o judges, some of their highest numbers are concentrated at the top of the table and then again in the middle of the table. This is not so terribly different from the cases of White judges. Finally, for Black and Latina/o judges, if the top three categories of sanctions are combined, they have the exact same numbers of cases, 17, though this number represents a higher percentage of the Latina/o pool.

Among the groups, Black judges, however, appear to face the toughest sanctions. That is, there is a higher concentration of cases involving Black judges in the top half of the table, which represents the harshest sanctions. For instance, the highest percentage of removal cases involve Black judges at 19.7%, even though there is both a higher percentage and a larger number of Latina/o judges who resigned than any other group. Further, the highest percentage of those judges suspended are Black. At the middle of the table, there is a second concentration of most groups' cases around the various reprimands. Again Black judges are more concentrated at the level of censure, presumably a harsher sanction than the public reprimand and admonishment where a higher percentage of Latina/os and White judges are sanctioned. This division becomes more distinct in the data on women of color.

Table 11<sup>224</sup>

<b>Distribution of Sanctions by Racial/ Ethnic Group</b>							
Sanctions	Total	White	Total Judges of Color	Black	Latina/o	Asian	Other
Removal "A"	9.5% (120)	9.1% (101)	12.8% (19)	19.7% (14)	7.7% (5)	0%	0%
Resignation "B"	11.9% (150)	12.2% (136)	9.5% (14)	4.2% (3)	16.9% (11)	0%	0%
Disability; Disbarment "C/D"	0.8% (10)	0.8% (9)	0.7% (1)	0%	1.5% (1)	0%	0%
Suspension "E" and "F"	11.0% (139)	10.9% (122)	11.5% (17)	14.1% (10)	9.2% (6)	10% (1)	0%
Public Censure "G"	17.3% (224)	18.1% (202)	14.9% (22)	25.4% (18)	4.6% (3)	10% (1)	0%
Public Reprimand "H"	25.5% (322)	26.3% (293)	19.6% (29)	12.7% (9)	24.6% (16)	30% (3)	50% (1)
Public Admonishment "I"	11.9% (150)	11.2% (125)	16.9% (25)	9.9% (7)	20% (13)	50% (5)	0%
Public warning "J"	1.6% (20)	0.9% (10)	6.8% (10)	1.4% (1)	12.3% (8)	0%	50% (1)
Private "K"	4.5% (57)	4.9% (55)	1.4% (2)	1% (1)	1.5% (1)	0%	0%

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224. Judicial Discipline Database, *supra* note 207.



Advisory Letter "L"	1.0% (12)	1.1% (12)	0%	0%	0%	0%	0%
Fine "M"	0.7% (9)	0.8% (9)	0%	0%	0%	0%	0%
Misc. "N"	0.1% (1)	0.1% (1)	0%	1% (1)	0%	0%	0%
Apology, Regret, Probation "P"	0.7% (9)	0.7% (8)	0.7% (1)	1% (1)	0%	0%	0%
Dismissed/ No Sanction	3.2% (40)	3.0% (33)	4.7% (7)	8.5% (6)	1.5% (1)	0%	0%
Total Actions	(1263)	(1115)	(148)	(71)	(65)	(10)	(2)

Analyzing the information through the tool of the tier system teases out some of these observations more precisely.

Table 12 below represents the tier analysis. It lists the tiers, which combine the sanctions into groups, in the first column. The second column provides the percentage of the entire pool each sanction represents. For example, the database contains 1263 judge's records, 280 of which incurred a sanction of removal, resignation, or disability/disbarment. These 280 cases are 22.2% of the entire pool. The other columns represent the different groups and the percentage of each group's cases that incurred the sanctions listed in that row (relative to their presence in the disciplinary pool), except for the judges of color (JoC) column. This column combines the figures for all Asian, Black, Latina/o, or Other judges. The tier analysis shows the distribution of cases within a particular racial or ethnic group and provides two points of comparison; namely, comparisons between the groups and a comparison of each group with the percentage of the pool that received that particular sanction.

Table 12<sup>225</sup>

<b>Tiers by Racial/Ethnic Group</b>							
<b>Sanctions</b>	<b>Total Pool</b>	<b>White</b>	<b>JOC</b>	<b>Black</b>	<b>Latina/o</b>	<b>Asian</b>	<b>Other</b>
I (A-D)	22.2% (280)	22.0% (246)	22.9% (34)	23.9% (17)	26.1% (17)	0.0% (0)	0.0% (0)
II (E/F)	11% (139)	10.9% (122)	11.4% (17)	14.1% (10)	9.2% (6)	10.0% (1)	0.0% (0)
III (G-H)	43.2% (546)	43.2% (495)	31.8% (47)	38.0% (27)	29.0% (19)	40.0% (4)	50.0% (1)
IV (I-J)	13.5% (170)	12.1% (135)	23.6% (35)	11.3% (8)	32.3% (21)	50.0% (5)	50.0% (1)
V (K-P)	6.9% (87)	7.5% (84)	2.0% (3)	2.8% (2)	1.5% (1)	0% (0)	0% (0)
No Sanction Dismissals	3.2% (40)	3% (33)	4.7% (7)	8.5% (6)	1.5% (1)	0% (0)	0% (0)
Total Actions	(1263)	(1115)	(148)	(71)	(65)	(10)	(2)

The analysis reveals a number of things about the relationship of the sanctions to the groups and the groups to each other. First, the percentages of cases involving White judges are closely related to the percentage of the total pool because cases involving White judges comprise the overwhelming majority of pool. Second, Black and Latina/o judges, with 23.9% and 26.1%, respectively, have the highest percentage of cases that incur tier one sanctions—removal, resignation, and disability/disbarment (relative to their incidence of discipline/presence in the discipline pool). These percentages are higher than the percentage of tier one sanctions incurred by cases involving White judges, at 22%. Cases involving Asian

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225. *Id.*

and Other judges did not incur any tier one sanctions.

Analyzing the distribution of sanctions by group, a tier analysis reveals the fact that Latina/o judges have the highest percentage of cases incurring tier one sanctions, relative to their presence in the pool. However, the percentages of those Latina/o judges who incurred tier two and three sanctions (the relatively harsh sanctions of suspensions, censures and reprimands) are lower than the percentage of those incurred by either Black or White judges. In fact, the largest concentration of cases involving Latina/o judges were sanctioned at tier four, with 32.3%. That is, 32.3% of Latina/o judges faced admonishments and warnings as compared to 13.5% of the entire pool at tier four (or well over two times the cases involving Black and White judges). Thus, although Latina/o judges have the highest percentage of those who faced tier one sanctions, 61% of the sanctions imposed in cases involving Latina/o judges were imposed at the level of tier three and tier four sanctions, which are milder than those found at the top of the table.

At first glance, the highest concentration of cases against Black judges incurred sanctions at tier three, censure and reprimand, at 38%. Upon closer analysis, however, this concentration is equal to the percentage of the combined percentages at tier one and two. In other words, 38% of the cases instituted against Black judges incurred sanctions of censures and reprimands, and another 38% (23.9% + 14.1%) incurred sanctions of removal, resignation and suspension, or tier one and two sanctions. These cases constitute the highest percentages of any group among the harshest sanctions meted out to judges. Further, the percentage of Black judges who faced tier one and two sanctions was higher than the pool percentages in both tiers; and the percentage of Black judges who incurred sanctions at the lower levels (milder sanctions, tier four and five) were all lower than the pool percentages for every level except where the case was dismissed or no sanctions” were imposed.

With regard to Asian judges, 90% of the disciplinary actions instituted against them incurred sanctions at tier three and tier four, with only 10% of the cases (1/10) incurring a sanction at tier two, the suspension level. Regarding “Other” judges, the two cases in the pool incurred sanctions at tiers three and four.

As for the cases instituted against White judges, those cases incurred sanctions lower than the pool percentages in every tier except tier three (censures and reprimands), where the cases are concentrated and the percentage was equal to the pool percentage, and in tier five sanctions (private sanctions, advisory letters, etc.), the mildest sanctions, where the percentage was slightly higher than the pool percentage. In fact, the percentages of cases wherein White judges incurred tier one and tier two

sanctions was lower than that of Black or Latina/o judges, with White judges incurring all of the milder sanctions at a higher percentage than Black judges, in particular, except for dismissals.

To the extent that cases involving Black and Latina/o judges incurred harsher sanctions, a gender analysis by group indicates the driving force behind the disparity.

### 3. Distribution of Sanctions and Gender Comparisons by Group

#### a. Men by Racial/Ethnic Group

Table 13 provides the overall data on the cases involving men broken down by racial groups. In brief, some of the patterns seen among the larger groups of color (including women and men) seem replicated here, except with smaller numbers. Further, as discussed earlier, male judges of color have a higher incidence of removal than white male judges, relative to their presence on the bench. However, this is driven by the high incident of removal for Black male judges.

Table 13<sup>226</sup>

Distribution of Sanctions of Men by Racial/ Ethnic Group <sup>227</sup>							
Sanctions	Total	White Men	Total Men JOC	Black Men	Latino	Asian Men	Other Men
Removal "A"	9.7 (99)	9.6% (88)	10.7% (11)	14% (7)	8.7% (4)	0%	0%
Resignation "B"	11% (112)	11.6% (106)	5.8% (6)	4.0% (2)	8.7% (4)	0%	0%
Disability Disbarment "C/D"	0.7% (7)	0.7% (6)	1.0% (1)	0%	2.2% (1)	0%	0%
Suspension "E" & "F"	11.1% (113)	10.7% (98)	14.6% (15)	18.0% (9)	10.9% (5)	10% (1)	0%
Public Censure	17.5% (178)	17.7% (162)	15.5% (16)	24.0% (12)	6.5% (3)	10% (1)	0%

226. *Id.*

227. *Id.*

“G”							
Public Reprimand “H”	26.5% (270)	27.2% (249)	20.4% (21)	16.0% (8)	26.1 (12)	10% (1)	0%
Public Admonishment “I”	11.4% (116)	10.8% (99)	16.5% (17)	10.0% (5)	19.6% (9)	30% (3)	0%
Public Warning “J”	1.8% (18)	1.0% (9)	8.7% (9)	2.0% (1)	15.2% (7)	0%	100% (1)
Private “K”	5.1% (52)	5.5% (50)	2.0% (2)	2.0% (1)	2.2% (1)	0%	0%
Advisory Letter “L”	1C% (10)	1.1 (10)	0%	0%	0%	0%	0%
Fine “M”	0.6% (6)	0.7% (6)	0%	0%	0%	0%	0%
Misc. “N”	0%	0%	0%	0%	0%	0%	0%
Apology, Regret, Probation “P”	0.9% (9)	0.9% (8)	1% (1)	2.0% (1)	0%	0%	0%
Dismissed No sanction	2.8% (28)	2.6% (24)	3.9% (4)	8.0% (4)	0%	0%	0%
Totals Disciplinary Actions/ Men/race	(1018)	(915)	(103)	(50)	(46)	(6)	(1)

However, a tier analysis, captured below in Table 14, reveals a number of very interesting pieces of information. First, cases involving white men –White male judges, not Black male or Latino judges–have the highest percentage of those incurring tier one sanctions. This reiterates the point that it is not cases involving Black male and Latino judges alone that are driving the disparities with regard to the severity of penalties of judges of color as a group in comparison to White judges as a group. Rather, cases involving women of color are contributing significantly to these disparities. However, the tier approach muffles the significance of removal. Recall that

the disparities between White men and men of color in terms of removal was 9.6% and 10.7%, respectively and that black male judges had the highest percentage of removals (14%).<sup>228</sup>

Table 14<sup>229</sup>

<b>Tiers by Group: Percentage of the men groups represented at each tier<sup>230</sup></b>							
Tiers (Sanctions)	Total Pool	White Men	MoC	Black Men	Latina/o	Asian Men	Other Men
I (A-D)	21.4% (218)	21.9% (200)	17.5% (18)	18% (9)	19.6% (9)	0%	0%
II (E/F)	11.1% (113)	10.7% (98)	14.6% (15)	18% (9)	10.9% (5)	16.7% (1)	0%
III (G-H)	44% (448)	44.9% (411)	35.9% (37)	40% (20)	32.6% (15)	33.3% (2)	0% (0)
IV (I-J)	13.2% (134)	11.8% (108)	25.2% (26)	12% (6)	34.8% (16)	50% (3)	100% (1)
V (K-P)	7.6% (77)	8% (74)	2.9% (3)	4% (2)	2% (1)	0% (0)	0% (0)
No Sanction Dismissals	2.8% (28)	2.6% (24)	3.9% (4)	8% (4)	0% (0)	0% (0)	0% (0)
Total actions	(1018)	(915)	(103)	(50)	(46)	(6)	(1)

Again, both Black male and Latino judges incur tier one sanctions lower than white men, and consequently lower than the pool percentage (second column). This means that overall, slightly fewer Black men and Latino

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228. *Id.*

229. *Id.*

230. *Id.*

judges are leaving the bench than are judges who are White men. However, judges of color who are men incur higher levels of suspensions. And as all but two of the of the seventeen cases that ended in suspension against judges of color involve male judges, it is suspensions of male judges of color, not women judges of color, which drive the suspension disparity between White judges and judges of color. Cases involving Black men have the highest percentage of suspensions.<sup>231</sup> At the same time, the percentage of cases involving judges who are Black men continue to be lower than the pool percentages at every tier level except for dismissals. These lower tiers represent progressively milder sanctions.

The percentage of cases involving Latino judges, though representing a high percentage, do not represent the highest percentage of those incurring tier one level sanctions. Latino judges maintain lower percentages of cases at every tier level except tier four—public admonishments and warnings—as did the entire Latina/o group (consisting of both women and men). Cases involving Latino judges continue to be concentrated at tier three and four sanctions, with the majority of tier three level cases incurring reprimands as opposed to censures, as indicated by the data.<sup>232</sup>

Regarding cases involving White men, not only do they have the highest percentage of cases incurring tier one sanctions, they have a slightly higher percentage of cases incurring sanctions at tier three. Otherwise like the larger group of White judges, (including White women and White men) the percentage of cases involving White male judges is lower than the percentage pool at tiers two (suspensions) tier 4 (public warnings etc.) and dismissals, and higher than the pool at tier five (private sanctions).

*b. Women by Racial/Ethnic Group*

Table 19 below provides the raw data on women. There are 245 disciplinary cases involving women, forty-five of which are women of color. As discussed earlier, White women, in relation to their percentage on the bench, have a lower incidence of discipline, as compared to women of color, who in general have a higher incidence of discipline.<sup>233</sup> Both the higher incidence of discipline and severer sanctions in cases involving women of color are predominantly comprised of cases involving Black women and Latina judges. However, a quick glance at the table reveals that despite the large percentages described below, the numbers, particularly in the case of the individual groups constituting women of color, are small; often single digits. Thus, although the cases involving

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231. *Id.*

232. *Id.*

233. 4.8% as compared to 8.2%.

Black women and Latina judges drive both the higher incidence of discipline and, more critically, the disparities in the severity of punishment between judges of color and White judges, much that is discussed below are observations. That is, the numbers in many instances are not large enough to make any definitive claims.

Returning to the severity and distribution of sanctions, the cases involving Black women and Latina judges, as the table displays, in some ways mirror each other with seven Black women and one Latina sanctioned through removal, and seven Latinas and one Black woman forced to resign, though the percentages are different given each groups relative presence in the pool (incidence of discipline). A less clear but similar mirroring occurs at the levels of censures, reprimands, and admonishment. In fact, similar to the removal/resignation mirror where eight cases are involved in each category, the more distorted mirroring at this level involves nine cases for both groups. In both areas Black women faced the harshest penalty of removal and censure, assuming censure is distinct from reprimands. Finally each group has one case at the suspension level.

In terms of percentages, specifically and including white women judges, Black women judges incur the highest percentage of removals relative to their incidence of disciplines at 33.3% as compared to 6.5% for white women and 5.3% for Latina judges. And, they also incur the highest percentage of public censures at 28.6%. However, Latina judges incur the highest percentage of resignations relative to their presence in the pool, at 36.8% as compared to 15% for White women and 4.8% of Black women judges. White women judges have the highest percentage of suspensions relative to their presence in the disciplinary pool and as compared to 5.3% of Latinas and 4.8% of black women judges.

Table 15<sup>234</sup>

Distribution of Sanctions of Women by Racial/ Ethnic Group							
Sanctions	Total	White Female	Total Female Judges of Color	Black Female	Latina	Asian Female	Other Female
Removal "A"	8.6% (21)	6.5% (13)	17.8 (8)	33.3% (7)	5.3% (1)	0%	0%

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234. *Id.*



Resignation "B"	15.5 % (38)	15% (30)	17.8% (8)	4.8% (1)	36.8% (7)	0%	0%
Disability Disbarment "C" & "D"	1.2% (3)	1.5% (3)	0%	0%	0%	0%	0%
Suspension "E" & "F"	10.6 % (26)	12.0% (24)	4.4% (2)	4.8% (1)	5.3% (1)	0%	0%
Public Censure "G"	18.8 % (46)	20.0% (40)	13.3% (6)	28.6% (6)	0%	0%	0%
Public Reprimand "H"	21.2 % (52)	22.0% (44)	17.8% (8)	4.8% (1)	21.1% (4)	50% (2)	100% (1)
Public Admonish- ment "I"	13.9 % (34)	13.0% (26)	17.8% (8)	9.5% (2)	21.1% (4)	50% (2)	0%
Public Warning "J"	2.0% (2)	0.5% (1)	2.2% (1)	0%	5.3% (1)	0%	0%
Private "K"	2.0% (5)	2.5% (5)	0%	0%	0%	0%	0%
Advisory Letter "L"	2.0% (2)	1.0 (2)	0%	0%	0%	0%	0%
Fine "M"	1.2% (3)	1.5% (3)	0%	0%	0%	0%	0%
Misc. "N"	0.4% (1)	0%	2.2% (1)	4.8% (1)	0%	0%	0%
Apology, Regret, Probation "P"	0%	0%	0%	0%	0%	0%	0%
Dismissed	4.9%	4.5%	6.7%	9.5%	5.3%	0%	0%

No sanction.	(12)	(9)	(3)	(2)	(1)		
Totals Disciplinary Actions	(245)	(200)	(45)	(21)	(19)	(4)	(1)

Applying a tier analysis to the relationship between women groups and sanctions, as captured below in Table 16, the analysis reveals that a substantial percentage of the cases involving Latina and Black women judges incurred tier one sanctions. Cases involving Latinas had the highest percentage of tier one sanctions (42.1%), followed by those involving Black women judges (38.1%). These percentages are substantially higher than the pool percentage (25.3%), higher than the percentage of White women that incur these sanctions (23%), and higher than the percentage of *all* male judges who incurred tier one sanctions.<sup>235</sup>

The percentages of cases involving Latina judges, like their Latino counterparts, are below the pool percentages in tiers two, three, and five and substantially higher than the pool percentages of tier four sanctions representing admonishments and warnings. However, unlike the cases involving their male counterparts, there is a slightly higher percentage of Latina cases among those dismissed or where no sanctions were imposed (this represents a single case).

Table 16<sup>236</sup>

	Total Pool	White Women	WoC	Black Women	Latina/o	Asian Women	Other Women
I (A-D)	25.3% (62)	23.0% (46)	36.0% (16)	38.1% (8)	42.1% (8)	0% (0)	0% (0)
II (E/F)	10.6% (26)	12% (24)	5% (2)	4.8% (1)	5.3% (1)	0% (0)	0% (0)
III (G-H)	40% (98)	42% (84)	31% (14)	33.3% (7)	21.1% (4)	50% (2)	100% (1)

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235. *Id.*

236. *Id.*

IV (I-J)	14.7% (36)	13.5% (27)	20% (9)	9.5% (2)	26.3% (5)	50% (2)	0%
V (K-P)	4.5% (11)	5% (10)	2% (1)	4.8% (1)	0%	0%	0%
No Sanction Dismissals	4.9% (12)	4.5% (9)	6.6% (3)	9.5% (2)	5.3% (1)	0%	0%
Total actions	(245)	(200)	(45)	(21)	(19)	(4)	(1)

As compared to Black women judges, aside from both groups' notable presence in cases incurring tier one sanctions, the next largest concentration of cases involving Black women lay in tier three - censures and reprimands, in contrast to Latina judges' cases, which concentrate in tier four. Even though cases involving Latinas have a presence among tier three sanctions, most of these cases incurred reprimands rather than censures, in contrast to cases involving Black women, assuming these sanctions are different.<sup>237</sup> This is similar to cases involving White women as compared to Black women judges. Cases involving White women, like those involving White men are concentrated at tier three level sanctions. And White women judges have a higher percentage of tier three cases than even judges who are Black women. However, cases involving Black women judges incurred censure at a higher level than did White women judges, who have a slightly higher percentage of tier four cases.<sup>238</sup> In fact, the percentage of cases involving Black woman judges are lower than the pool percentages for all tiers except for the milder tier five sanctions (warnings and admonishments) and dismissals.

Cases involving White women represent a lower percentage of tier one sanctions as compared to both Black women and Latina judges. However, this percentage is higher than those incurred among cases involving White men, who have the highest percentage of tier one sanctions among men. Although making a one to one comparison between women and men is difficult, this datum challenges the notion that cases involving women in general and White women in particular, are less severely sanctioned than

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237. *Id.*

238. *Id.*

those involving men. Admittedly, White women have a significantly lower incidence of discipline and attract much lower levels of removals.<sup>239</sup> However, when the three top sanctions are combined, cases involving White women incur tier one sanctions at a slightly higher rate than White men, 23.0% as compared to 21.9%, respectively, and consequently all men.<sup>240</sup> These data indicate that overall, women, including Black, Latina, and White women judges, leave the bench at a higher rate than do judges who are men.

In addition, the percentage of cases where White women incur tier two sanctions, is higher than those involving Black women and Latina judges, but is also higher than the percentage of cases against White male judges who incur these sanctions. In other words, a higher percentage of White women judges are suspended (12%) than are Latina judges (5.3%), Black women judges (4.8%), and White male judges (10.7%), though lower than the percentage of Black male judges suspended (18.0%).<sup>241</sup>

Asian women judges' cases are concentrated in tiers three and four, similar to the Asian male judges. And, the one Other woman judge's case incurred a tier level three sanction while the one man categorized as Other incurred a tier four sanction.

In summary, a higher percentage of cases involving women of color incur the harshest sentences, resulting in them disproportionately leaving the bench. Furthermore, these harsh sentences in part drive the disparities between judges of color and Whites. Among women of color, cases involving Black women incur the highest percentage of the harshest sanction, removal. However, Latina judges are losing their judicial commissions through resignations in almost equal measure, constituting a tier one sanction. The lower percentage of cases involving White women that incur severe sentences masks the tough sanctions imposed on women of color. Yet, White women in this sample are not necessarily less severely sanctioned than are judges who are men. In fact, White women judges are forced to leave the bench at a higher rate than male judges generally,<sup>242</sup>

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239. Compare Table 13: Distribution of Sanctions of Men by Racial/ Ethnic Group, with Table 15: Distribution of Sanctions of Women by Racial/ Ethnic Group.

240. Compare Table 14: Tiers by Group: Percentage of the Men Groups Represented at Each Tier, with Table 16: Tiers by Group: Percentage of the Women Groups Represented at Each Tier.

241. The key to this puzzle with regard to tier one sanctions is that although Latina judges have the highest rate of forced resignations (38.6%), White women resign more often than White male judges (15% as compared to 11.6%). White men judges have the highest resignation rate among men.

242. 23.0% of White women judges as compared to 21.4% of judges who are men. Even, if you remove the cases involving disability or orders to never serve on the bench, White women still have a higher incidence of being forced to leave the bench

even as they are certainly less severely sanctioned (and consequently leave the bench in lower numbers) than are women judges of color, particularly Black women and Latina judges.<sup>243</sup>

One other note, although the number of cases that were dismissed or in which no sanction was imposed is small (3.2%), Black judges (both women and men) and Latina judges predominate. Are these cases more difficult to prove? Are more of these cases frivolous? The numbers do not tell.

### *B. Charges*

This section briefly turns to the number of misconduct charges or findings filed against a judge in order to explore the relationship between this and the severity of sanctions imposed generally, and specifically with regard to women of color. The analysis reveals a measure of rationality in the system even as the judicial disciplinary systems in place vary across fifty different states.

This issue of charges is problematic in two ways.<sup>244</sup> First, it is not clear that a judge has been found guilty of all of the misconduct the state commissions contend. A court, as in Judge Peebles case, may simply issue an order stating that there was misconduct without specifying what conduct put forward by the commission the Court found problematic.<sup>245</sup> While the database records all of the charges listed, it is not clear if the sanction imposed is intended to correct or condemn all of the misconduct listed, or if some specific type of conduct dominated the state's determination. Further, the practice of simply attaching a host of charges to an investigation, sometimes engaged in by prosecutors, in hopes that one or more charges

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than do White men but the difference is slight, 21.5 to 21.2

243. 23.0% of White women judges as compared to 38.1% of Black women judges and 42.1% of Latina judges in this pool leave the bench pursuant to disciplinary action. In addition, even if you combine tier one and two sanctions (suspension), Black women and Latina judges are more severely sanctioned than are White women judges who have the highest rates of suspensions among women. In combining these sanctions, 35% of White women either left the bench or were suspended, as compared to 42.9% of Black women judges and 47.4% of Latina judges, the majority of which left the bench.

244. Also, the data here is not as clean. For instance, a number of judges with two charges kept coming up in the search for judges with a single charge.

245. Missouri Commission on Retirement, Removal and Discipline, *RE: The Matter of the Honorable Barbara Peebles: Findings of Fact, Conclusions of Law, and Recommendation* [submitted to Supreme Court Aug 31, 2012, NO. SC92811 (March 29, 2013)] at 1-2 at [http://www.stltoday.com/commission-report-on-barbara-t-peebles/pdf\\_fe28ac3e-f3b7-11e1-baca-001a4bcf6878.htm](http://www.stltoday.com/commission-report-on-barbara-t-peebles/pdf_fe28ac3e-f3b7-11e1-baca-001a4bcf6878.htm) and <http://bloximages.newyork1.vip.townnews.com/stltoday.com/content/tncms/assets/v3/editorial/f/e2/fe28ac3e-f3b7-11e1-baca-001a4bcf6878/504135946ccc0.pdf.pdf>

“might stick” undermines any analysis that seeks to link the severity of sanctions with the number and nature of the conduct.

Nevertheless, there were two hypotheses here. First, a single charge would not result in the imposition of the harshest sanctions. Second, the more charges attached to a judge’s case, the more severe the sanction. Regarding the first hypothesis, the database demonstrates, contrary to the hypothesis, that a judge charged and found to have engaged in a single *type* of misconduct could be disciplined and severely disciplined. In fact more than half the cases (745) represent a single charge, as Table 17 below indicates. Simply finding that a judge engaged in a specific type of misconduct resulting in a single descriptive charge or commission finding, did not mean that there were not multiple instances of this misconduct or a pattern of this type of conduct requiring chastisement. Further, the nature of the conduct presumably has greater impact on the sanction determination. At the same time, however, the data demonstrates (looking across the rows in Table 22) that the severest sanctions represent a much smaller percentage of the pool where a single conduct charged resulted in a sanction.

Table 17<sup>246</sup>

Relationship between Number of Charges and Sanctions <sup>247</sup>						
	A	B	E and F	G	H	I
Charge 1 (745 cases)	6% (42)	11% (82)	8.3% (62)	16.6% (124)	30% (229)	13.4% (100%)
2 Charges (242 cases)	12.3% (30)	9.5% (23)	11.5% (28)	19.8% (48)	22% (54)	10.7% (26)
3 Charges (129 cases)	16.3% (21)	12.4% (16)	19.4% (25)	20% (26)	14.0% (18)	8.5% (11)
4 Charges (46 cases)	15% (7)	17.4% (8)	19.5 (9)	6.5% (3)	24% (11)	13% (6)

246. Judicial Discipline Database, *supra* note 207.

247. *Id.*

5 Charges (10 cases)	30% (3)	2.4% (2)	30% (3)	10% (1)	0%	0%
6 Charges (8 cases)	50% (4)	0%	12.5 (1)	25% (2)	0%	0%
7 Charges (6 cases)	50% (3)	16.7% (1)	0%	33% (2)		

Regarding the second hypothesis, the data revealed that the more charges listed, the larger portion of the pool, the harsher sanctions claimed (looking down the columns). This was particularly true for removals. The percentage of resignations generally increased with additional charges up to the point of four charges. Suspensions increased with additional charges up to the point of five charges. This was so even though the pools became smaller as the number of charges increased. After suspensions, including censure, reprimand, and admonishment, the increase in charges showed mix results.

Applying the insights provided by analyzing the number of charges to the observations about cases involving women of color who incurred severe tier one sanctions, a set of sixteen cases was revealed. With regard to the number of charges filed these cases break down as follows:

- Seven cases in which only one type of conduct was reported. However, in two cases the conduct was undisclosed.
- Five cases in which two types of conduct were charged and presumably stuck.
- One case with three charges.
- Three cases in which four or more charges were levied.

The table demonstrates, a person can incur a tier one sanction on a single charge of misconduct, although the chances are small (6%). Thus, the imposition of tier one sanctions, based on the single criterion of one type of conduct is completely plausible. This says nothing about the type of misconduct for which these women were charged or whether there were multiple instances of this conduct. Furthermore, not much can be concluded given the small numbers of the pool. However, it is interesting that of the twenty-seven women of color who had a single charge representing one type of conduct, at least five (excluding the undisclosed conduct of two) or 18% of them incurred tier one sanctions.

Two or more charges substantially increase the chances that a tier one sanction might be imposed. Therefore, on this criterion alone, the sanctions imposed on these cases are facially plausible, even as they

contribute to disparities between people of color and Whites, and are masked in the disparities between female and male judges.

Still, presumably, sanctions turn less on the number of alleged charges and findings than on the type of misconduct in which the individual engaged. By focusing on those cases where a single charge or type of misconduct was listed, it became possible to identify some types of conduct that frequently end in one type of sanction or another.

When the database was reduced to those cases involving a single charge, the largest category in the database, and then further limited by the type of sanction imposed, two fairly intuitive insights became clear. First, when the sanction of removal (A) was searched within the single charge subgroup, criminal conduct was the most prevalent or most repeated conduct sanctioned by removal. Although a host of different types of conduct result in removal of a judge from the bench, criminal conduct was the leading cause for removal. Similarly, when limiting the search to judges with one charge and who then resigned (B), the conduct most repeated and thus the leading cause of resignation was failure to meet educational requirements. The definitiveness of these searches becomes murkier as the sanctions become less severe and more of an all-purpose tool to express disapproval.<sup>248</sup> Nevertheless, a brief analysis of this sort might provide more information as to why a particular set of cases, those involving severely sanctioned women of color, might have incurred a particular set of sanctions.

### *C. Sanctioned Conduct*

The most important factor in determining a sanction for misconduct is the nature of the conduct. Murder in the criminal context often garners a harsher sanction than does assault. This section is meant to briefly explore some of the conduct that tended to lead to particular types of sanctions and may aid in explaining the high incidence of tier one sanctions occurring in cases involving women of color.

This section only reviews those types of behavior that often lead to a particular sanction. As such, it is incomplete. It is also incomplete because the relationship between the sanction imposed and the behavior chastised in cases involving the other groups (i.e. men of color, White women and men) are not explored. However, it may provide some further context for understanding the sanctions imposed and thus the disparities between the groups.

Table 18 below lists a selected group of sanctions and provides the leading types of conduct for which the sanction was imposed and the

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248. So for instance, a wide range of conduct incurred the sanction of reprimand.



number of appearances for each conduct type. For instance, in the removal (“A”) column, of the 745 cases where one charge representing a single type of conduct was sanctioned, six percent or forty-two cases incurred removal. One type of conduct, criminal conduct, was cited fourteen times, and was the most repeated conduct that lead to removal. Although a host of different types of adjudicated misconduct ended in removal, the types of conduct that were most often repeated are identified. In this example, “criminal” conduct, “failure to follow the law,” and “miscellaneous” reasons constituted the highest number of repeat players. There were fourteen cases in which the single charge was for criminal conduct resulting in removal. Failure to follow the law and miscellaneous reasons were charged in three cases each, which resulted in removal.

Table 18<sup>249</sup>

<b>Relationship between Sanction and Conduct<sup>1</sup></b>						
745 cases total	A Removal	B Resignation	E/F Suspension	G Censure	H Reprimand	I Admonishment
Percentage	6% (42)	11% (82)	8.3% (62)	16.6% (124)	30.7% (229)	13.4% (100)
Leading Conduct (No. of appearances)	Criminal Conduct (14); Failure to Follow Law/ Abuse of Discretion (3); Misc. (3)	Educational Failure (15); Criminal Conduct (9); Admin. Failure (7)	Off-bench Personal; (8) Admin. Failure (7); Criminal/DWI (5)	Admin. Failure (13); Failure to Follow Law (12); Misc. (12); Demeanor (11) DWI (10)	Demeanor /Partiality (33); DWI (27); Failure to Follow Law (20); Delay and Diligence (17); Ex parte (14); Admin. Failure (14)	Demeanor (18); Admin. Failure (10); Failure to Follow Law (10); Seeking Favorable Treatment (7); Delay and Diligence (6)

249. Judicial Discipline Database, *supra* note 207.

In analyzing this limited data, judges were not removed for certain types of misconduct; including drinking while intoxicated; delay or lack of diligence with regard to court duties, and failure to cooperate with a judicial disciplinary commission. See Appendix. It makes sense that judges are not removed simply for failing to cooperate with the commission, as the commission was likely investigating evidence of some other conduct. This so even if commissioners become frustrated with uncooperative judges. Nevertheless, six judges were sanctioned for this conduct, but not removed. One wonders, however, where the line lies between noncooperation and the right to a zealous defense.

However, while there are types of misconduct for which only one or two judges were removed, there are two types of conduct for which the only judges removed were judges of color. These included removals for inappropriate demeanor or comments, and administrative failure. See Appendix. All three removals involved Black judges (two of the three were removed for administrative failure). Still, judges have been removed for almost every type of misconduct. The same holds true for resignations. Regarding suspensions, personal misconduct and administrative failure are both repeat players. Together, however, they account for only fifteen of the sixty-two cases in this category.

Two types of conduct, in addition to failing to cooperate with the commission, stand out for their broadness and the number of cases of which they are a part. These types of conduct are demeanor, found in 220 cases, and administrative failure, found in 147 cases. This may mean that many judges engage in these types of behavior. However, it may also mean that the conduct is so broad that it captures a wide range of behaviors, which when so captured, simply result in this conduct being added to other charges. However, with regard to administrative failure, it also appears in cases across the sanction spectrum, from resignation to admonishment. Thus, it is likely a significant concern; though except for egregious cases, the most common and perhaps the most appropriate sanction seems to be censure or reprimand.

In applying these few observations to the cases involving women of color, recall there were sixteen cases of women judges of color that incurred tier one sanctions. Of these, seven were sanctioned on a single charge—two of which were undisclosed—and the rest had two or more charges against them. While not much can be said given the numbers, four cases stand out. Each aids in illustrating the points above or provide additional information. These cases involve the misconduct of administrative failure, the failure to cooperate with the commission, and failure to comply with education requirements.

The first notable case against a woman judge of color in which she was

removed is a case in which the only misconduct sanctioned was administrative failure. Unless the failure was really egregious, administrative failure without more does not appear to be grounds for removal in the overwhelming majority of cases and jurisdictions captured in this data. The same analysis applies to the misconduct of inappropriate demeanor, for which the typical sanction is a reprimand. Yet this woman of color judge was removed for this conduct. But see Appendix.

In the second case, the state presumably found that the judge had engaged in two types of misconduct. These were administrative failure and failure to cooperate with the judicial disciplinary commission. Here, it appears that administrative failure was the substantive charge and the motivating factor for the commission's investigation. Again, unless the behavior was egregious, and perhaps even if it was, without more, the charge does not appear to be grounds for removal. In addition, the judge was uncooperative with the commission (or was she zealously defending herself?). But there are no cases in which a judge who failed to cooperate with the disciplinary commission was removed. Would two charges, neither of which standing alone warrant removal, in fact warrant removal if combined together? Apparently so, in this case.

The third case also involves two charges. This case involved the charge of delay and diligence on the one hand and failure to cooperate with the disciplinary commission on the other. No judge in this data set was removed for the primary misconduct of lack of diligence or delay. And, as before, no judge has been removed for failing to cooperate with the commission. Would this failure of cooperation convert a reprimand or admonishment level violation into a removable offense? Again, apparently so.

Finally, the last case involves the failure to comply with educational requirements. This case is raised to highlight another factor that must be taken into account in assessing the appropriateness of sanctions. This factor includes the particularities of different states. For instance, of the sixteen cases involving women of color and for which there was a single charge representing a single type of conduct, three are from Texas. One involves educational requirements and the judge resigned. This type of conduct often leads to resignation. Almost all of the resignations reported in the chart above on this issue, come from Texas. Texas had 119 disciplinary actions against judges in the period studied. Of those, thirty-nine have resulted in resignation (32.8%); apparently one of the sanctions of choice in Texas. However, a sizable group of those sanctioned in Texas are justices of the peace, some of whom are non-lawyers. A peculiarity of Texas and a few other states, this reminds that the particularities of states are an important factor in evaluating sanctions. As such, this particular case of a woman judge of color does not stand out, at least on the numbers.

In the end, I do not believe that cases can be decided or justice done on the numbers. But perhaps numbers can be used in service of justice.

#### VI. SUMMARY OF FINDINGS AND OBSERVATIONS

This section is intended to summarize the major findings and observations gleaned from assembling the case summaries documenting judicial misconduct cases for the years 2002-2012 into a database. The database contains 1263 entries representing 1263 judges, against whom state judicial disciplinary proceedings were instituted. Of the 1263 judges involved in disciplinary proceedings, the cases of forty judges were either dismissed or no sanction was imposed. There are 120 cases that ended in removal.

This is a preliminary study on disparities in the prosecution and sanction of judicial misconduct cases. As such, its findings and observations will benefit from further analysis, testing, challenge, and debate. In this regard, the author is happy to make the database available for further study. The study's major findings, based on 2010 data, and observations are listed below.

#### **Findings:**

##### ***National Composition of State Bench***

- The State Bench is still dominated by White judges, at 91.7%.<sup>250</sup>
- The State Bench is still dominated by men, at 73%.<sup>251</sup>
- The State Judicial Bench is still dominated by White men, at 67.9%.<sup>252</sup>
- Women judges represent 27% of the State Bench. Their numbers have increased every year since The America Bench has kept records (even in 2012 when the number of judges on the State Bench decreased slightly).<sup>253</sup>
- Judges of color (JoC) represent 8.3% of those on the State Bench. Their numbers have likely declined over the past decade.<sup>254</sup>

##### ***Judicial Misconduct Actions***

###### Incident of Discipline Relative to Bench Presence

- JoC have a higher incidence of disciplinary actions instituted against them, at 10.3%, than do White judges, at 7.0%.<sup>255</sup>
- Men have a higher incidence of disciplinary actions at 8.0%, than do

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250. Table 3, *supra* note 168.

251. Table 2, *supra* note 159; Table 4, *supra* note 168.

252. Table 5, *supra* note 170.

253. Table 2, *supra* note 159.

254. Table 3, *supra* note 168.

255. Table 7, *supra* note 209.

women, at 5.2%.<sup>256</sup>

- Men of color (MoC) have the highest incidence of discipline at 11.6%.<sup>257</sup>
- Though women judges overall have low incidents of discipline relative to their presence on the bench, women of color (WoC) have a high incidence of discipline at 8.2%.<sup>258</sup>
- WoC's incidence of disciplinary action is higher than that of White women at 4.8%, White men at 7.8%, but lower than those of men of color at 11.6%.<sup>259</sup>

#### Removal and Resignations Relative to Incidence of Disciplinary Action

- WoC have the highest level of removal from the bench at 17.8%.<sup>260</sup>
- JOC have a higher incidence of removal from the bench, at 12.8%, than do White judges at 9.1%.<sup>261</sup>
- WoC removal rates contribute significantly to the high incidence of removals of JoC, and thus the disparities between JoC and White judges.<sup>262</sup>
- WoC have the highest incidence of recorded resignations, at 17.8%.<sup>263</sup>
- Women have higher incidence of resignations, 15.5%, than judges who are men, at 11%.<sup>264</sup>
- White judges have a higher incidence of resignations at 12.2%, than do JoC, at 9.5%,<sup>265</sup> and White male judges have a higher incident of resignations, at 11.6% than do male judges of color at 5.8%.<sup>266</sup>
- Overall, women judges, including Black women, Latina, and White women judges, leave the bench, pursuant to disciplinary action, at a higher rate than do men.<sup>267</sup>

#### Dismissals or No Sanction Imposed

- Women have a higher incidence of dismissals or cases in which no sanction was imposed, at 4.9% than do men, at 2.8%.<sup>268</sup>

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256. Table 9, *supra* note 213..

257. Table 10 *supra* note 214..

258. *Id.*

259. *Id.*

260. *Id.*

261. Table 7, *supra* note 209.

262. Table 10, *supra* note 214; Table 7, *supra* note 209. *See also* Table 11, *supra* note 224; Table 13, *supra* note 226; Table 15, *supra* note 234..

263. Table 15, *supra* note 233.

264. *Id.*; Table 13, *supra* note 226.

265. Table 11, *supra* note 224.

266. Table 13, *supra* note 226.

267. Table 16, *supra* note 236.

268. Table 13, *supra* note 226; Table 15, *supra* note 233.

▪JoC have a higher incidence of dismissals or cases in which no sanction was imposed, at 4.7%, than do White judges, at 3.0%.<sup>269</sup>

### **Observations:**

#### Incident of Discipline, Removals and Sanctions

- Black women judges have the highest incidence of removal, at 33.3%.<sup>270</sup>
- Latina judges have the highest incidence of resignations, at 36.8%.<sup>271</sup>
- Black male Judges have the highest incidence of suspension, at 18%, followed by White women judges, at 12.0%.<sup>272</sup>
- Latina/o judges have the highest incidence of discipline at 15.9%, followed by Black judges at 9.2%.<sup>273</sup>

#### Charges and Types of Misconduct

- The number of charges of misconduct have an impact on the severity of a sanction, particularly with regard to removals and resignations.<sup>274</sup>
- Cases in which a judge was involved in criminal conduct is one of the most consistent types of misconduct leading to removal, although almost every type of conduct or combination could lead to removal.<sup>275</sup> (No criminal cases resulting in removal involved women judges of color).
- Failure to comply with education requirements is one of the most consistent types of misconduct leading to resignations, however almost any type of conduct or combination could lead to a resignation.<sup>276</sup>

## VII. CONCLUSIONS: SOME PERSONAL THOUGHTS

Two years ago I learned about the three cases that began this article. I learned about Judge Peebles' case first. The judicial commission prosecuting her case was recommending that she be removed. Now, I will admit that I was not exactly disinterested but I was confused and startled enough to look into the case with a relatively open mind. When I did, and learned a bit of the background, I became convinced, that assuming the majority of the charges were true, that the conduct did not warrant removal. The penalty recommended seemed disproportionate to the misconduct alleged. Evidently the Supreme Court of Missouri agreed. But even they, I

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269. Table 11, *supra* note 224.

270. Table 15, *supra* note 233..

271. *Id.*

272. Table 14, *supra* note 229..

273. Table 8, *supra* note 210.

274. Table 17, *supra* note 246.

275. Table 18, *supra* note 249 .

276. *Id.*

believe, went too far.

Months later, I was attending a conference where a colleague from the West Coast began complaining about a hotly contested judicial election involving another woman judge of color. I wondered: Is this a phenomenon, a pattern into which I should look? A little research, motivated by curiosity more than anything else, led me to the New Jersey disciplinary case involving a Black male judge. And, the game was on.

I thought this would be a short little piece; after all, it was not on my research agenda.

Further, I thought the research would be fairly easy. It was not. In fact, the data, which I had assumed would be widely and easily available, scarcely existed; and when it did, it was not in any updated, comprehensive or comprehensible form. I guess, to my surprise, all the diversity talk out there had really seeped into my consciousness. This talk suggests, on the one hand, that our society values, respects, and embraces all of its people and is open to exploring the different experiences, cultures and historically and contextually shaped knowledge, ideas and perspectives we, as a society, embody. On the other hand, it suggests that our society includes all of its people—all of us - in its institutions and in access to resources and opportunities, no matter our differences across race, ethnicity, gender, sexuality etc. As these ideas are contrary to our long-lived historical practices, diversity talk suggests that we are actively pursuing these goals. I was surprised by my own shock.

Generally, when I hear some CEO, university administrator or others talk about their commitment to “diversity,” and “inclusion,” etc., and then look around at their institutions, my response is a barely audible “Mhummm,” - my version of the proverbial rolling of one’s eyes or in the vernacular of my kids, saying, “Yeah right.” That is, most diversity talk strikes me as just that: Talk; a rhetoric that is supposed to make the speaker or institution look good. Few people - even some of us who are fully committed to it - want to do the hard complicated work of making diversity real, of changing the landscape including public policies, institutional priorities, social operations and arrangements and economic incentives in a way that would allow anyone and everyone, who so wanted and was willing to work for it, to become a judge or anything else.

Yet, I was even more surprised by some of the civilized polite hostility my various requests for information generated. Nothing, in my mind, could be more innocuous than an academic calling “professionals” and asking for demographic information about a particular state’s judicial bench. But few, responding to my requests, seemed to share my perspective. Rather their various reactions seemed to range from a suppressed notion of we will not help this “Negress” who is trying to stir

up trouble and disrupt our “traditional way of life,” – a way of life built on the subordination of others - to, “we do not appreciate people digging around in matters that might expose White privilege,” and finally, to those who seemed to say, “we do not talk about race in polite company.” Gender, for whatever reason did not evoke the same kind of discomfort, which may be why the American Bench directory provides a gender progress report but not a racial/ethnic progress report. Nonetheless, the latter group of responders struck me as “colorblind struck,” and the others gave me the impression that they had something to hide.

The “colorblind struck” folks, it seems to me, are concerned about the harms they think that race-talk engenders, including those to human dignity, those of reinforcing socially constructed illusory distinctions between people and of balkanizing groups. But they seem blind or simply indifferent to the vast costs mainstream colorblindness inflicts - the deep reactionary work it does, when employed, in hiding, freezing in place and projecting into the future the status quo of vast inequalities and limited freedom for some as a result of continuing privilege for others based on skin color - that they pretend to not see. As to the others, what, could those others to whom my inquiries were directed, possibly have or want to hide? Perhaps, if they were trying to hide anything at all, they were trying to hide the fact that White and male privilege continues to exist and likely contributes to a host of damaging gender and racial disparities that potentially extend to the judiciary.

Of course from my perspective, White and male domination and privilege, as well as, disadvantages to women and people of color is our collective reality; as is the reality of deeply embedded bias, racism and sexism, among others, in our institutions, systems and psyches. Thus, as this is obvious at least to me, racial and gender oppression is no secret and we need to stop trying to hide, mystify, cheat and lie about it. The only questions are, what are we doing about them and will we pass this on to yet another generation of our people, as was done to us? Because, again, from my perspective, if colorblindness, as suggested above, is a charade and diversity is, by half measure, a farce, then the practice of “colorblind diversity,” given where we truly are, is both an absurdity and a tragedy, which in the long run will be clear, not hidden.

As for disparities, if they exist in this context, this would not really be news. Disparities in general, including gender and racial disparities are ubiquitous in this, and perhaps most, societies. Some disparities we can easily explain. Some of the disparities are the result of processes that we think are fair; others not. And, some we cannot explain. In this context, if gender and racial disparities exist, as I suggests they do, they may be explainable in terms of the conduct in which these judges engaged, the number of charges they faced, the particular state rules that governed them,



etc. If that were it, this would be curious but acceptable. Curious, because, as my comments above indicate, unlike the Supreme Court, given our history and present realities, I would flip the presumption (perhaps this is un-lawyerly) and assume racism (bias, animus, strategic and structural racism – as well as sexism) influences these processes, unless otherwise demonstrated. And unlike Justice Powell, who thought he could, and we should do nothing about “societal discrimination,”<sup>277</sup> I think the rest of us can and should. But in any event, as this is a first pass, a preliminary study with several small data sets, I am perfectly open to credible research that suggests otherwise.

So, after months of research, inquiries and the work of actually constructing the database, what did this study find? It found disparities. It found disparities in the incidence of discipline and in the severity of sanctions. Specifically, relative to their presence on the state bench, men are more disciplined than are women judges. Judges of color are more often disciplined than are White judges. Judges of color who are men have the highest incident of discipline, relative to their presence on the bench. And women judges generally are disciplined less often than are male judges, though not necessarily less severely. That is—except for women judges of color. Women judges of color, not only have a higher incidence of discipline – relative to their presence on the bench, than do White men and White women, but they are also the most harshly sanctioned relative to their presence in the disciplinary pool. In other words, women judges of

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277. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986) (striking down a collective bargaining agreement that abridged a seniority plan and provided heightened protection for Black teachers, who presumably would have been the first fired because they were the last hired). Justice Powell was quoted as saying:

Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . No one doubts there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive.

Innocence is relative. And, as I noted elsewhere in roughly the same form: Apparently it is acceptable for Black people and other NonWhites [including our children] to suffer the costs of societal discrimination operating to their detriment and to the unjust benefit of Whites, but inappropriate and over-expansive for Whites to bear any costs in eliminating this same societal discrimination in which they are often complicit and which primarily and inappropriately privileges them. Athena D. Mutua, *The Rise, Development, and Future Directions of Critical Race Theory*,” 84 DEN. U. LAW REVIEW 329, 366 (2006).

color are sanctioned more severely for misconduct than are male judges of color, White women and White men. News? Valid? I leave this determination to interested others to further explore.

#### APPENDIX

##### EXAMPLES OF CONDUCT AND SANCTIONS

#### **Administrative Failure; Inappropriate Delegation of Authority; and Staff issues**

- 2 Removals (both Black judges).
- 8 Resignations.
- Most common sanction for this conduct is censure and reprimand.
- In two cases, no sanction imposed (1 Latina).  
(But see, Gray, *supra* note 176, explaining that 8 of 110 removals between 1990-2001 involved neglect or improper performance of administrative duties, many involving failure to remit funds.)

#### **Attempting to Obtain Favorable Treatment; Off-Bench Use of Prestige of Office**

- 2 Removed
- 2 Resigned
- Most common sanction was either a censure or reprimand

#### **Criminal Conduct**

- 23 Removals or resignations.
- Other sanctions included censure, reprimand, and admonishment.
- Some states require that judges be removed when they have been convicted of a crime.
- Of the 57 judges sanctioned for criminal conduct, two were judges of color, one resigned, the other suspended

#### **Delay and Diligence**

- 0 Removals.
- 4 Resigned.
- 3 Suspended.
- Most common sanction is reprimand
- 6 people of color sanctioned.

#### **Demeanor, Partiality; Comments on the Bench**

- 1 Removed (Black male judge).
- 5 Resigned.
- Most common sanction is reprimand.
- (But see Gray, *supra* note 176 at 10-11, noting that 10 judges of 110 were removed for demeanor related findings)

#### **Drinking while intoxicated (DWI)**

- 0 Removed.
- 2 Resignations.

- Most common sanction is reprimand.
- Four people of color sanctioned.

**Ex Parte Communications**

- 2 Removals.
- 0 Resignations.
- Most common sanction was reprimand.

**Failure to Comply with Educational Requirements**

- 1 Removal.
- 16 Resignations.
- 25 of these cases came from Texas, many regarding justices of the peace (other states included Louisiana, New York, Utah and South Carolina).

**Failure to Cooperate with Commission; Lying to Commission; Asking Witnesses to Lie; Retaliating against Complainant (6/60)**

- 0 Removals.
- 2 Resignations (both in Massachusetts).
- Only 6 people engaged in this conduct for which a sanction imposed. However, this conduct is among other conduct in 60 other cases. Where there are two or more charges, some 21 people have been removed—a full third of this pool—of which eight were people of color (seven were Black, one was a Latina). Additionally, another 8 people were asked to resign. One of the 8 was Latina.
- (See Gray, *Supra* note 176 at 67, noting that behavior during investigation often is an aggravating factor or separate charge of misconduct and in some cases “appeared to be a decisive factor leading to a judge’s removal.”)

**Failure to Follow the Law; Legal Error; and, Abuse of Discretion**

- 3 Removals; one of which was a Latina/o Latina judge.
- 3 Resignations.
- Most common sanction is reprimand followed by a censure and admonishment.
- 8 people of color sanctioned for this conduct, though not necessarily removed.

**On-Bench Abuse of Power**

- 2 Removed (1 Latina)
- 3 Resignations.
- 1 Suspended (Latina)
- Most common sanction was reprimand.

**Personal Conduct (conduct related to off-bench activity)**

- 1 Removed.
- 3 Resigned (1 Latina).
- 8 Suspensions.
- Most common sanction was a reprimand.

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- When allegations around personal conduct have been among other charges, the rate of removals and other tough sanctions increase incredibly.